Terracon, Inc. *and* International Union of Operating Engineers, Local 150, AFL–CIO. Cases 13–CA–39181, 13–CA–39271, and 13–CA–39279

June 6, 2003

DECISION AND ORDER

By Chairman Battista and Members Liebman and Acosta

On May 21, 2002, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in opposition to the Respondent's exceptions, and the Respondent thereafter filed an answering brief. The Charging Party filed a cross-exception and a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² No exceptions were filed to the judge's conclusions that the Respondent violated Sec. 8(a)(1) through the following conduct: interrogating its employees about their activities on behalf of the Union; warning the employees that their activities on behalf of the Union would be futile; and threatening the employees that it would close the Naperville facility—and contract out the work performed there—because the employees engaged in activities on behalf of the Union.

We additionally affirm the judge's dismissal of that portion of the complaint alleging that the Respondent violated Sec. 8(a)(1) by denying employee Eliezer Rodriguez' request for the presence of another employee, Hector Caballero, at an interview that, according to the General Counsel, had the potential to result in discipline. The judge dismissed this allegation based on the Respondent's witness' credited testimony that Rodriguez in fact had not requested the presence of Caballero at the interview. As we find no basis here for reversing the judge's finding, we affirm that finding and, consequently, we affirm the judge's dismissal of the 8(a)(1) allegation. Accordingly, we find it unnecessary to pass on the Respondent's claim that the judge erred in failing to dismiss the allegation on the additional grounds that (1) at the time of Rodriguez' alleged request for the presence of Caballero, Caballero was not an "employee" of the Respondent, and (2) that the rights afforded by NLRB v. J. Weingarten, 420 U.S. 251 (1975), and Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), do not extend to the situation in which the employee representative requested is an alleged coconspirator of the individual who is the subject of the interview/investigation.

Nevertheless, we disavow reliance on the judge's statement that "the Board conceded in the enforcement proceedings of *Epilepsy Foundation* that *Weingarten* theories do not apply to coconspirators."

only to the extent consistent with this Decision and Order.

The principal issue in this case is whether the Respondent—through the words and conduct of two alleged supervisors—voluntarily recognized the Union as the bargaining representative of its drillers and helpers, such that its subsequent refusal to recognize and bargain with the Union constituted a violation of Section 8(a)(5). For the reasons that follow, we find, contrary to the judge, that the Respondent did not voluntarily recognize the Union and, accordingly, did not violate Section 8(a)(5) as a result of its subsequent refusal to recognize and bargain with the Union.³

I. FACTS

The Respondent is engaged in the business of conducting soil tests for commercial enterprises. At its Naperville, Illinois facility the Respondent employs, inter alia, nine drillers and driller helpers (helpers), who work in two-person crews to collect the soil samples used for testing. On February 19, 2001,⁴ a scheduled workday, the Naperville drillers and helpers, each of whom wore a baseball hat emblazoned with the Union's logo, arrived at the Respondent's Naperville facility, accompanied by Union Organizer Stan Simrayh and Union Attorney/Organizer Ken Edwards. Simrayh and Edwards, having previously obtained authorization cards from each of the drillers and helpers, approached Maroun Mousallem, the Respondent's Naperville office manager,⁵ and explained that the purpose of their visit was to request that the Respondent voluntarily recognize the Union. Mousallem and the union representatives thereafter proceeded to Mousallem's office, at which time Simrayh handed to Mousallem photocopies of the authorization cards signed by the nine employees, 6 a letter requesting

Chairman Battista and Member Acosta note further that, given the posture of this case, they find it unnecessary to pass on the merits of *Epilepsy Foundation*.

³ Consequently, we reverse the judge's conclusion that the Respondent further violated Sec. 8(a)(5) by altering the time at which the employees were required to begin working each day, without first providing notice to, or bargaining with, the Union. As a result, we find it unnecessary to pass on the Respondent's exception alleging that the judge improperly prohibited the Respondent from introducing evidence that would demonstrate that the change in employee start times did not actually result in a loss of work hours or, consequently, a loss in pay.

⁴ All dates referenced herein are in 2001 unless otherwise indicated.

⁵ As office manager of the Naperville facility, Mousallem is responsible for the day-to-day operations of the Naperville facility.

⁶ The union representatives presented nine authorization cards, one signed by each of the nine drillers and helpers who reported to work on February 19. In response to a contention of the Respondent, however, the judge determined that the card signed by employee Ryan Carpenter should not be considered in any determination of the Union's majority status, as Carpenter did not perform any work for the Respondent during 2001. No party has excepted to that finding.

recognition, and a blank "voluntary recognition agreement." Mousallem examined the authorization cards and other documents and conceded that each of the Respondent's drillers and helpers had signed an authorization card. Mousallem thereafter engaged in a discussion with Simrayh and Edwards regarding the employees' concerns and their reasons for enlisting the assistance of the Union. In brief, the union representatives described various items of concern or interest to the employees, after which Mousallem responded that he didn't think that those items "would be a problem." In response to Simrayh's subsequent inquiry as to whether the Respondent would meet again with the Union to discuss such matters, Mousallem told Simrayh and Edwards that they should return later that morning, when the Respondent's Illinois regional manager, Kevin Jefferis, would be available.

When Jefferis arrived at the facility, Mousallem informed him of the Union's earlier visit and the events that had transpired. Subsequently, Simrayh and Edwards returned to the facility, at which time they presented to Jefferis the authorization cards, the letter demanding recognition, and the "voluntary recognition agreement."9 Similarly to Mousallem, Jefferis examined the authorization cards and other documents and conceded that each of the Respondent's drillers and helpers had signed an authorization card. Simrayh thereafter relayed to Jefferis the concerns and requests of the employees—including such items as better winter coveralls, an increased boot allowance, and HAZMAT training—to which Jefferis responded that most of those issues were "peanuts." Jefferis thereafter asked Simrayh and Edwards what the Union "could do for" the Respondent, including what the Union could do with respect to the employees' attendance and punctuality problems. Additionally, the judge found that Jefferis inquired as to the wage-rate changes sought by the Union, 10 as well as whether the Union could refer qualified employees. At the conclusion of the meeting, and in response to Simrayh's inquiry as to whether the parties could meet again, Jefferis told the union representatives that he would "be in touch." Immediately following the meeting, Jefferis called the Respondent's CEO to inform him about the Union's visit, whereupon the CEO advised Jefferis to hire a labor attorney. Two days later, Jefferis sent Simrayh a letter that stated, in pertinent part, that the Respondent was "not familiar with the unionizing process," and that it understood that—by its conduct in conversing with the Union on February 19—it did not recognize the Union or begin negotiations or bargaining.

II. THE JUDGE'S DECISION

The judge concluded that the Respondent, through the conduct of employees Jefferis and Mousallem, voluntarily recognized the Union as the bargaining representative of its drillers and helpers and, accordingly, that the Respondent violated Section 8(a)(5) by thereafter withdrawing recognition.¹² Specifically, relying primarily on Richmond Toyota, 287 NLRB 130 (1987), the judge found that Mousallem-by his actions in reviewing the materials proffered by the Union and his remarks to the union representatives that Jefferis would meet with them—demonstrated a "commitment to bargain" with the Union which, in turn, constituted an implicit recognition of the Union. The judge further found that Jefferis' subsequent discussions with the Union not only reaffirmed the Respondent's commitment to bargain, but also constituted actual bargaining with the Union. On the basis of that finding, the judge analogized the facts of this case to those in Lyon & Ryan Ford, 246 NLRB 1 (1979), enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981), in which the Board concluded that the employer recognized the union through its actions in reviewing the employees' authorization and applicationfor-membership cards, accepting and examining a proposed contract, and meeting with the union representatives on several occasions to discuss and negotiate the terms of the proposed contract.

⁷ Specifically, Mousallem indicated that the employees' requests for better winter coveralls and an increased boot allowance likely "would not be a problem." Additionally, in response to Simrayh's statement that the employees would like additional time to inspect and perform maintenance on equipment to enhance safety, Mousallem indicated that it would be "a good idea"; similarly, Mousallem remarked that the provision of HAZMAT training to all employees appeared to be "a good way to go."

⁸ As Illinois regional manager, Jefferis was responsible for the oversight—in terms of administration, marketing, and profit—of all of the Respondent's Illinois offices.

⁹ Also present during the meeting with the union representatives, at Jefferis' request, were Mousallem and Stephen Bucher, manager of Respondent's geo-technical engineering group.

¹⁰ With respect to the issue of wages, Simrayh testified that Jefferis stated that "if he had to pay Union wages . . . it wouldn't be fruitful for the company to stay in drilling and they would have to terminate the Drilling Division." Tr. 86–87.

¹¹ Although the Respondent contends that Jefferis told the Union at the conclusion of the meeting that "Corporate" would be in touch with them, the judge credited the testimony of Simrayh and Edwards that Jefferis stated that *he* would be in touch.

¹² As part of that determination, the judge concluded that, as of February 19, the Union enjoyed majority status among an appropriate unit of employees, consisting of the Naperville drillers and helpers, and that both Jefferis and Mousallem possessed actual and apparent authority to recognize the Union as the bargaining representative of those employees. The Respondent has excepted to these findings. Based on our conclusion that the Respondent did not voluntarily recognize the Union, discussed below, we find it unnecessary to address the Respondent's exceptions.

III. THE PARTIES' CONTENTIONS

The Respondent, asserting that it did not voluntarily recognize the Union, contends that the judge utilized the incorrect legal standard in analyzing the facts of this case. Specifically, the Respondent avers that, contrary to the judge, an employer's "commitment to bargain" on some demonstrable showing of majority status no longer suffices to establish a grant of voluntary recognition. Rather, the Respondent contends, the Board in Jefferson Smurfit Corp., 331 NLRB 809 (2000), held that a finding of voluntary recognition requires evidence that an employer expressly consented to a determination of a union's majority status by means other than a Board election and, accordingly, implicitly overruled precedent to the contrary (including the decisions on which the judge relied). Further, the Respondent claims that the judge improperly discounted factually similar Board decisions—including Nantucket Fish Co., 309 NLRB 794 (1992), and Ednor Home Care, 276 NLRB 392 (1985) and instead relied on decisions that are distinguishable from the instant case.

Conversely, the General Counsel and the Charging Party assert that the judge properly applied extant Board precedent in determining that the conduct of Mousallem and Jefferis demonstrated the Respondent's voluntary recognition of the Union.

IV. ANALYSIS

The Board will find that an employer has voluntarily recognized a union when there is a clear and unequivocal agreement by the employer to recognize the union on proof of majority status, and the union's majority status has been demonstrated. See *Nantucket Fish Co.*, supra. While the requisite clear and unequivocal agreement to recognize the union may be demonstrated by an employer's express statements granting recognition, the Board additionally has held that an employer's statements or conduct evidencing a "commitment to enter into negotiations with the union [may constitute] an *implicit* recognition of the union." Id. at 795 (emphasis added); see *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), enfd. 601 F.2d 575 (3d Cir. 1979).

Contrary to the Respondent's contention, the Board did not repudiate or retreat from the concept of implicit recognition in *Jefferson Smurfit*, supra. Indeed, the Board majority in *Jefferson Smurfit* cited and relied on the Board's prior decision in *Nantucket Fish*, in which, as noted above, the Board reiterated that a commitment to enter into negotiations with the union is an implicit recognition of the union.¹³ Thus, the Board in no way

suggested that a finding of voluntary recognition requires evidence that the employer at issue *expressly consented* to a determination of a union's majority status by means other than a Board election.¹⁴ Rather, the Board simply reaffirmed the established principle that—regardless of the explicit or implicit means through which an employer is alleged to have recognized the union—the relevant statements and conduct of the employer must clearly and unequivocally demonstrate an agreement to recognize the union.

Turning to the application of established precedent to the facts of this case, we conclude, contrary to the judge, that the facts here do not establish either an explicit or implicit clear and unequivocal agreement by the Respondent to recognize the Union. Specifically, we reject the judge's findings that certain statements and conduct of employees Mousallem and Jefferis demonstrated a commitment to enter into negotiations with the Union, and that Mousallem's and Jefferis' discussions with the union representatives constituted actual "bargaining."

In rejecting the judge's finding that the Respondent's conduct and statements demonstrated a commitment to bargain with the Union, we rely on the analogous decision of the Board in Nantucket Fish, supra. In that case, the employer's representative and its attorney met with the union representative and several employees at the conclusion of a hearing, prior to which the union representative had approached the employer's representative to inform her that the union represented a majority of the employer's employees, and to present to her a copy of an employee petition and union letter demanding recognition. In response to the union's statement that it represented a majority of the employees and that it wanted to discuss dates on which the parties could "bargain and discuss the issues," the employer's representative replied, "fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon." Nantucket Fish, 309 NLRB at 794.

On these facts, the judge in *Nantucket Fish* concluded that the employer representative, by her statement to the union, had committed herself to meeting with the union for bargaining and, consequently, had implicitly recognized the union. The Board, however, found that the employer's response was subject to more than one inter-

¹³ Additionally, we note that there was no contention in *Jefferson Smurfit* that the employer had made a commitment to enter into nego-

tiations with the union. In fact, the employer's manager, after reviewing and copying the union's authorization cards, told the union that the employer needed to consult with counsel.

¹⁴ Rather, the Board simply made a factual finding that, in that particular case, the respondent had not expressly consented to such a determination. Subsequently, the Board went on to consider the General Counsel's argument that the respondent's recognition of the union could be inferred from a manager's conduct in reviewing and copying authorization cards proffered by the union.

pretation and, further, that the ambiguity could not be resolved definitively through the consideration of other evidence. Accordingly, the Board concluded that the statement did not constitute a clear and unequivocal agreement to recognize the union, and that the employer did not violate Section 8(a)(5) by subsequently refusing to recognize and bargain with the union.

Similarly here, Mousallem's statement to Simrayh and Edwards that they should return later in the morning when Jefferis would be available to talk to them is subject to more than one interpretation. Although it is possible that Mousallem's statement could convey the impression that Mousallem had agreed to recognize the Union and that bargaining would proceed through Jefferis, 15 it is equally possible, if not more probable, that Mousallem's statement was a disavowal of authority to make a decision as to whether the Respondent would recognize and bargain with the Union (such that the union representatives would need to return to speak to the actual decision maker). Similarly, Jefferis' statement at the conclusion of the meeting that he "would be in touch" with the Union, in response to the Union's inquiry regarding whether the parties could meet again for discussions, is at best ambiguous. Although Jefferis' statement could imply that the Respondent was willing to meet for negotiations with the Union, an equally logical interpretation is that the Respondent would consider the Union's request and later respond to it. See id. at 795. Accordingly, as in Nantucket Fish, supra, the Respondent's statements are ambiguous, and the consideration of surrounding circumstances-for example, the Respondent's failure to complete or sign the blank "voluntary recognition agreement" proffered by the union representatives, and the absence of any statements of agreement to recognize the Union—does not resolve the ambiguity in such a way as to support a conclusion that the Respondent clearly and unequivocally agreed to recognize the Union. See Ednor Home Care, 276 NLRB 392, 395 (1985).

As noted above, the judge—relying on the Board's decision in *Richmond Toyota*—characterized Mousallem's remarks described above as an affirmative assurance that the Respondent (through Jefferis) would meet with the Union to begin negotiations. We find *Richmond Toyota* distinguishable from the instant case. In that case, the respondent's vice president/general manager—in response to a union's request for recognition, and follow-

ing its proffer of authorization cards—told the union that she was unavailable on the specific date suggested by the union for the purpose of meeting to negotiate a contract, but that her husband (the respondent's president and sole owner) would handle the negotiations and would contact the union. *Richmond Toyota*, 287 NLRB at 130. After the requested meeting date passed, the union called the respondent's vice president, complaining that the respondent had not yet contacted the union regarding negotiations; the respondent's vice president responded that she had told the union that she was unavailable on the requested date, and that her husband "[was] going to talk to [them]." Id. at 131. During that conversation, she additionally provided the union with her husband's telephone number.

Here, in contrast to the employer representative in *Richmond Toyota*, Mousallem did not expressly tell the Union that another agent of the Respondent (i.e., Jefferis) would engage in negotiations with the Union; perhaps more significantly, Mousallem did not reaffirm such a commitment on a subsequent occasion. Moreover, the additional circumstantial evidence that contributed to the Board's finding of voluntary recognition in *Richmond Toyota*—for example, behavior by the union representatives that was consistent with recognition and otherwise inconsistent with the union's interest—is lacking in this case. ¹⁶

Just as we reject the judge's determination that Mousallem's suggestion to Simrayh and Edwards that they return later to speak to Jefferis constituted an initial commitment by the Respondent to bargain with the Union, we also disavow the finding that Jefferis' subsequent discussion with Simrayh and Edwards both reaffirmed that earlier commitment and demonstrated a renewed commitment to bargain. As found above, the mere fact that Jefferis engaged in a conversation with the Union did not obligate the Respondent to recognize the Union. Similarly, in our view, Jefferis' dialogue with the Union

¹⁵ This is apparently the construction accorded Mousallem's statement by the judge. Indeed, such a characterization led the judge to compare Mousallem to the employer representative in *Richmond Toyota*, supra. For the reasons set forth below, we find that the facts of that case are distinguishable from those present here.

¹⁶ In *Richmond Toyota*, the union—subsequent to its receipt of, and its reliance on, assurances from the employer vice president that her husband would contact the union to begin negotiations—withdrew the representation petition that it previously had filed with the Board.

In the instant case, there is no comparable evidence that serves to elucidate the parties' state of mind following their February 19 meeting. The Union (via Simrayh) did send to Jefferis a letter stating, inter alia, that the Union "[was] glad to begin bargaining" with the Respondent regarding the terms and conditions of employment of the unit employees, and that the Union was available on certain enumerated dates to meet for the continuance of negotiations. Given its carefully chosen language, however, that letter (as well as Jefferis' subsequent letter in response), appears intended simply to summarize the events of the meeting in the light most favorable to the Union's (or Respondent's) respective position, and to preserve that characterization in anticipation of any potential future dispute.

(as well as Mousallem's earlier discussion with the Union) cannot be equated with the give-and-take characteristic of negotiations.

Ednor Home Care, supra, is instructive on this point. In that case, the Board adopted the administrative law judge's finding that the respondent did not voluntarily recognize the union when one of the respondent's partners met with the union representative for approximately 45 minutes, during which time he reviewed the union's proffered authorization cards, asked a "number of questions regarding the probable nature and extent of the union demands, and requested that [the union representative] furnish a blank form of the union contract." Ednor Home Care, 276 NLRB at 393. T Specifically, the judge found, inter alia, that the respondent had not engaged in negotiations with the union. Rather, the judge characterized the respondent representative's discussions with the union representative as merely an effort to gather information regarding the employees' purported desires and their motives for seeking union representation. See id. at 393-394.¹⁸

Similarly here, Mousallem and, later, Jefferis, met with the union representatives for a brief period of time, ¹⁹ during which they responded to the Union's recitation of employee "demands" with comments to the effect that such items were unlikely "to be a problem." As it is undisputed that neither Mousallem nor Jefferis conceded the Union's majority status or made any express remarks connoting an intent to recognize the Union, we find that the actions of the Respondent here, like those of the respondent in *Ednor Home Care*, simply represented the Respondent's efforts to educate itself about the Union's purported purpose and to assess whether or not it should

grant recognition to the Union.²⁰ In our view, the characterization of the parties' meetings as akin to an informational, rather than bargaining, session is consistent with the Board's established objective of promoting voluntary recognition,²¹ and, consequently, it effectuates the Act's purpose of promoting collective bargaining. Were we to find that any employer that merely extends the courtesy of permitting a union to enter its premises and state its purpose thereby obligates itself to enter into a bargaining relationship with the union, employers might be compelled to simply deny the union the opportunity to express its objectives or, further still, to avoid altogether any contact with the union.

For all the foregoing reasons, we conclude that the Respondent here did not voluntarily recognize the Union as the bargaining representative of its employees. Accordingly, we reverse the judge's conclusion that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union, and we dismiss that allegation of the complaint. Consequently, as noted supra at fn. 3, we additionally reverse the judge's related conclusion that the Respondent violated Section 8(a)(5) by unilaterally changing the work hours of the employees without bargaining with the Union, and we dismiss that allegation of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Terracon, Inc., Naperville, Illinois, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Interrogating its employees about their membership in, or activities on behalf of, the Union.
- (b) Warning its employees that their activities on behalf of the Union would be futile.
- (c) Threatening its employees that the Respondent would close its Naperville, Illinois facility or threatening

¹⁷ The judge provided the following example of an exchange between the employer and union representatives regarding the employees' requests: The union representative "mentioned the number of paid holidays that would be demanded and [the employer] asked if the Union would accept a lesser number, to which [the union representative] responded that that was a subject that could be negotiated." Id. at 393.

¹⁸ The facts in *Ednor Home Care* stand in stark contrast to those in *Lyon & Ryan Ford*, supra, on which the judge here relied in finding that the Respondent's discussions constituted negotiations. In *Lyon & Ryan Ford*, the employer engaged in detailed, substantive discussions with the union representatives on two separate occasions. Specifically, the judge in that case found, inter alia, that the parties reviewed, and the employer asked substantive questions regarding, the specific provisions of the union's master contract, and the parties discussed the "job classifications of specific employees on an employee by employee basis." Id. at 3. Moreover, the employer had agreed to meet with the union on a third occasion. Accordingly, we find that *Lyon & Ryan Ford* is inapposite to this case.

¹⁹ Jefferis testified that the meeting in which he participated with the union representatives lasted approximately 30 minutes; in contrast, Simrayh testified that the meeting lasted for approximately 1 hour. In either case, we note that the meeting between the parties was rather brief.

²⁰ The judge here distinguished *Ednor Home Care* from the instant case based on the fact that the respondent representative in Ednor Home Care specifically testified that he merely spoke with the union representative to obtain as much information as possible. We note initially that the judge in Ednor Home Care, in specifically rejecting the General Counsel's contention that the respondent representative should have articulated that motive by stating his intent to consult with his partners before making a decision whether to recognize the union, stated that such a requirement would improperly place "the burden on [the respondent] to overtly negate recognition in a conference such as the one he had with [the union representative]." Id. at 395. We agree that the party alleged to have recognized a union should not bear the burden to affirmatively negate recognition; similarly, the outcome of a particular case should not turn on the quality of a witness' posthoc justification for his actions. Accordingly, we accord no weight to the absence of testimony from Mousallem or Jefferis regarding their subjective intentions in conversing with the union representatives.

²¹ See *MGM Grand Hotel*, 329 NLRB 464, 466 (1999).

employees that it would contract out the work of that facility, because its employees have engaged in activities on behalf of the Union.

- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facility in Naperville, Illinois, copies of the attached notice marked Appendix.²² Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2001.
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your membership in, or activities on behalf of, the International Union of Operating Engineers, Local 150, AFL–CIO.

WE WILL NOT warn you that your activities on behalf of the Union will be futile.

WE WILL NOT threaten that we will close our Naperville, Illinois facility, or threaten that we will contract out the work of that facility, because you have engaged in activities on behalf of the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TERRACON, INC.

Vivian Perez Robles, Esq., for the General Counsel.

Douglas A. Darch and Alysa M. Barancik, Esqs., of Chicago,
Illinois, for the Respondent.

Pasquale A. Fioretto and Charles R. Kiser, Esqs., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Chicago, Illinois, on January 28-February 1, 2002. On February 26 and April 5 and 9, 2001, International Union of Operating Engineers, Local 150, AFL-CIO (the Union), filed the charges in Cases 13-CA-39181, 13-CA-39271, and 13-CA-39279, respectively, under Section 10(b) of the Act alleging that Terracon, Inc. (the Respondent) has engaged in unfair labor practices as set forth in the Act. On an investigation of those charges, the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by interrogating employees and threatening employees with loss of employment because they had engaged in activities on behalf of the Union and by denying an employee assistance by another employee during a disciplinary interview. The complaint further alleges that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition that it had previously granted to the Union as the collective-bargaining representative of certain of its employees and by unilaterally changing certain working conditions of those employees. The Respondent duly filed an answer admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ Unless otherwise indicated, all dates mentioned are from May 2000 through April 2001.

On the testimony and exhibits entered at trial,² and after consideration of the briefs that have been filed,³ I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

As it admits, at all material times the Respondent, an Iowa corporation, with an office and place of business in Naperville, Illinois, called Respondent's Naperville facility, has been engaged in the business of providing professional engineering, testing, and environmental services. In conducting the business operations during the year preceding the issuance of the complaint, the Respondent purchased and received goods and services valued in excess of \$50,000 directly from suppliers located at points outside Illinois. Therefore, at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Complaint Allegations

The Respondent is engaged in the business of soil testing for commercial enterprises. (The tests are conducted to determine load-bearing capacities for building sites and to determine the presence of foreign elements that may affect the environment.) To collect the soil samples, the Respondent employees' crews composed of a driller and a drilling helper.

The Respondent is a nationwide concern that has about 1300 supervisors and employees.4 Operationally, the Respondent divides the country into area divisions (Midwest, Southwest, etc.); the divisions are subdivided into State regions. The Respondent's Northeast division includes its Illinois region which is headquartered at the Naperville facility. As well as a complete facility in Naperville, the Respondent's Illinois region has complete facilities in Bloomington, Mokena, Rockford, and Lake Zurich. Each of the five Illinois facilities has an office manager who reports to the Respondent's Illinois regional manager who, at the time of the events in question, was Kevin Jefferis. As Illinois regional manager, Jefferis reported directly to Dennis Whited who was then the Respondent's Northeast division manager. Also, for the 5 or 6 years preceding time of trial, Jefferis was a member of the Respondent's board of directors.

Jefferis worked almost entirely out of the Naperville facility which has about 45 supervisors and employees. Maroun Moussallem was the Respondent's office manager at Naperville; Steve Bucher was the manager of the Naperville office's geotechnical engineering group; and Osvaldo (Oz) Marquez was classified as the Respondent's drilling coordinator. The complaint alleges, and the Respondent admits, that Jefferis and Moussallem were supervisors and (at least for some purposes) agents within Section 2(11) and Section 2(13) of the Act. The Respondent denies that Marquez was a supervisor or an agent. The complaint does not allege that Bucher was a supervisor or agent; however, Jefferis testified that Bucher hired engineers for the Respondent, and the Respondent, on brief, concedes that Bucher is a supervisor. The Respondent further admits that Erick Kunz was the office manager of the Respondent's Rockford facility and that Kunz is its supervisor and agent.

The complaint alleges that, in violation of Section 8(a)(1), between January 1 and February 23, Marquez, Kunz, and Jefferis threatened employees with loss of work if they selected the Union as their collective-bargaining representative and that Jefferis also interrogated employees. The complaint further alleges that the Respondent's Naperville drillers and drilling helpers (helpers) constitute a unit appropriate for bargaining within Section 9(b) of the Act, that by February 17 all of the Respondent's drillers and helpers had designated the Union as their collective-bargaining representative by signing union authorization cards, and that on February 19 Moussallem and Jefferis (a) examined the cards, (b) orally granted recognition to the Union as the collective-bargaining representative of the unit employees, and (c) engaged in bargaining with representatives of the Union. The complaint further alleges that, in violation of Section 8(a)(5), on February 21, by letter of that date, the Respondent withdrew recognition from the Union and that the Respondent has thereafter refused to recognize the Union as the collective-bargaining representative of the unit employees. The complaint further alleges that, in further violation of Section 8(a)(5), on or about March 14, the Respondent, without prior notice to or bargaining with the Union, changed the work hours of the unit employees. The complaint further alleges that, in further violation of Section 8(a)(1), on or about April 6, the Respondent conducted a disciplinary interview of employee Eliezer Rodriguez after refusing Rodriguez' request to have present at the interview "another employee," Hector Caballero.

The Respondent denies responsibility for any threat that disputed Supervisor Marquez may have made, and it denies that any of the alleged threats or the interrogation occurred. The Respondent admits that Jefferis and Moussallem met with representatives of the Union on February 19, and it admits that Jefferis and Moussallem then examined union authorization cards that had been signed by all of its drillers and helpers who then worked out of the Naperville facility. The Respondent, however, denies that its drillers and helpers constitute a unit appropriate for bargaining, it denies that Jefferis or Moussallem had actual or apparent authority to grant recognition to the Union, and it denies that Jefferis and Moussallem agreed to recognize the Union or that they engaged in any bargaining with

² Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate words that have become extraneous; e.g., "Doe said, I mean, he asked ..." becomes "Doe asked" Some extraneous usages of "you know" are omitted from the quotations of transcript. When quoting exhibits, I have not corrected capitalizations, but I have corrected certain meaningless grammatical errors rather than use "(sic)." All entries in brackets have been made by me.

³ The General Counsel's unopposed motion to correct the record is granted.

⁴ The Respondent's stationery lists 21 States in which it operates.

⁵ Complaint par. VI(d).

agents of the Union. The Respondent admits its unilateral changing of the work hours of its drillers and helpers, but it denies that it had any duty to bargain with the Union over the changes. The Respondent further denies that Rodriguez requested the presence of Caballero at the April 6 disciplinary interview, and the Respondent further contends that, even if Marquez did request Caballero's presence: (1) in a nonunionized operation, employees do not have a right to have such a request honored by their employer; (2) Caballero was a coconspirator in the suspected misconduct of Rodriguez and, therefore, the Respondent had no duty to honor any alleged request by Rodriguez for Caballero's presence at the interview; and (3) Caballero was not "another employee" whose presence Rodriguez could have effectively requested because Caballero had been discharged by the time that Rodriguez' interview began.

B. The 8(a)(5) Allegations

1. The alleged grant and withdrawal of recognition

The case law on which the parties base their respective contentions will be detailed infra; it suffices at this point, however, to note that Section 8(a)(5) requires an employer, on request, to bargain with a labor organization only if that labor organization represents a majority of the employer's employees in a unit that is appropriate for bargaining under Section 9(b). A union may achieve majority status through an election that is conducted by the Board under Section 9(c) of the Act, and, if it does so, the employer is lawfully bound to recognize and bargain with it (again, and hereafter, assuming a request to bargain). A Board election, however, is not the only way that a union may establish majority status; a union may also establish majority status by securing from a majority of a unit's employees authorization cards that designate it as their collective-bargaining representative. NLRB v. Gissell Packing Co., 395 U.S. 575 (1969). However, if a union establishes its majority status by authorization cards (or by other means short of a Board election, such as a recognitional strike that has majority employee support), the employer is not required, by the fact of the majority establishment alone, to recognize and bargain with that union. Linden Lumber Division, Sumner & Co. v. NLRB, 419 U.S. 301 (1974). That is, even if an employer has received evidence of a union's majority status (by lawful means such as an authorization card check or by counting his employees on a recognitional picket line), he does not violate Section 8(a)(5) if he does no more than refuse a request to bargain. But if the employer does commit to bargain on a union's demonstration of majority status, and if that demonstration is made, the employer may not thereafter repudiate its commitment and refuse to bargain with the union without violating Section 8(a)(5). Snow & Sons, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (9th Cir. 1962), and other cases cited below.

In this case, the General Counsel contends that on February 19, 2001: (1) the Respondent's Naperville facility employed nine drillers and helpers who constituted a unit of employees appropriate for bargaining; (2) the Union demonstrated its majority status in that unit by Simrayh's and Edwards' (a) bringing nine drillers and helpers with them to demand recognition and (b) presenting Jefferis and Moussallem with authorization

cards signed by all nine of those employees, which cards designated the Union as their collective-bargaining representative; and (3) after the Union had demonstrated its majority status, the Respondent, by Jefferis and Moussallem, committed to bargain with the Union, and did bargain with the Union. As a result, the General Counsel contends, the Respondent violated Section 8(a)(5) when, by its letter of February 21 (quoted in full below), it withdrew recognition from the Union.

The Respondent answers that: (1) the Naperville drillers and helpers do not constitute a unit appropriate for bargaining; (2) even if drillers and helpers constitute an appropriate unit, the size of the unit was not established at trial, and, therefore, even if all nine of the union authorization cards that the Union presented to Jefferis and Moussallem are counted, they cannot be said to represent a numerical majority; (3) Carpenter was not employed by the Respondent during 2001, and his union authorization card should not be included in any analysis; (4) neither Jefferis nor Moussallem had the authority to grant recognition to the Union; and (5) even if Jefferis and Moussallem did have such authority (a) they did not expressly agree to recognize the Union on February 19, and (b) they did not bargain with the Union on that date. The Respondent therefore argues that its February 21 letter cannot be characterized as a withdrawal of recognition; the Respondent, instead, argues that its February 21 letter can be accurately characterized only as a rejection of a February 20 claim by the Union, by letter of that date, that the Respondent had granted recognition to the Union and bargained with it on February 19.

a. Evidence presented by the General Counsel

Stan Simrayh is an organizer for the Union. Simrayh testified that on February 10 he met with five of the Respondent's drillers and helpers: John Howard, Rob Renner, Hector Caballero, Eliezer (Elliot) Rodriguez, and Juan Reyes. At that meeting, those five employees signed cards authorizing the Union to be their collective-bargaining representative in dealings with the Respondent. Simrayh further testified that he gave some blank union authorization cards to Renner at the February 10 meeting and that, by February 13, Renner had returned cards to him that had been signed by drillers and helpers Jeff Medina, Rolando Salazar, Ricardo Barreto, and Ryan Carpenter. Copies of all of these nine union authorization cards were ultimately authenticated and received into evidence. The Respondent contests the validity of Carpenter's card on the ground that Carpenter was not employed by the Respondent during 2001, but it does not contest the validity of the other eight cards as employee designations of the Union as their collectivebargaining representative. (Carpenter did not testify.)

On Monday, February 19, the drillers and helpers⁶ were scheduled to begin work at 6 a.m. by attending a training session that was then scheduled in a conference room at the Naperville facility. About 5:30 a.m. on February 19, Simrayh and union attorney (and organizer), Ken Edwards, met with seven

⁶ Unless otherwise indicated, subsequent references to the Respondent's drillers and helpers are references to the Respondent's Naperville drillers and helpers.

of the above-named nine employees⁷ in a parking lot near the Naperville facility. (Salazar and Medina were not there.) Simrayh and Edwards passed out baseball-type caps, with prominent union logos on the crowns, to the seven employees. The union representatives and the seven employees then drove to the Respondent's parking lot. Salazar and Medina joined the group at that point, and Simrayh gave them union caps also. Simrayh and Edwards, accompanied by all nine employees, who were then wearing the union caps, approached Moussallem in the Respondent's lobby. According to Simrayh's undenied testimony, Simrayh and Edwards introduced themselves to Moussallem, and Simrayh stated that the group was there "seeking voluntary recognition on behalf of the Union." Moussallem asked Simrayh and Edwards to come into his office (and the employees went into the conference room for the training session). Simrayh and Edwards asked for the discussion to take place in the presence of the employees, but Moussallem insisted that the three of them go into his office and allow the employees to go to the previously scheduled training session. In the office, further according to Simrayh:

I requested voluntary recognition. . . . I told him that we [were] there on behalf of Local 150, that we represented a majority, if not all, of his driller and helper employees, and that we were there demanding recognition as the bargaining unit representative of their employees. . . . [A]t the same time I offered him a copy of the authorization cards.

What Simrayh actually offered to Moussallem was three sheets of paper, each of which contained copies of three of the union authorization cards that the nine employees had signed. Additionally, Simrayh handed to Moussallem a letter that requested recognition of the Union as the collective-bargaining representative of the Respondent's "operating engineer craft unit"; the letter closed by stating: "We demand your immediate response." Simrayh also gave Moussallem a blank form entitled "Voluntary Recognition Agreement." The voluntary recognition agreement form, if signed by an authorized agent of the Respondent, would have granted recognition to the Union "as the sole and exclusive bargaining agent of all full and part time employees in the bargaining unit of:" Then followed a space for entry of a description of a bargaining unit; nothing, however, had been written in that space. Simrayh testified that Moussallem "very carefully reviewed" the union authorization cards. As Moussallem did so, Simrayh asked him if he realized that the cards were signed by all of the Respondent's drillers and helpers; Moussallem replied that he did. Simrayh further testified that Moussallem, at the same time, also reviewed the demand letter and the voluntary recognition agreement form. Further according to Simrayh:

I asked him if he would consider speaking to us about the employees' wages and working conditions. . . .

Mr. Moussallem responded by stating that if we were even looking for five cents more an hour that the Company could not afford it and they would be forced to take very drastic action. . . .

Ken Edwards asked what he meant by "very drastic action." . . .

Moussallem stated that the Company would be forced to subcontract out the drilling work and terminate the drilling division of the Company....

Ken Edwards asked how he knew that he could not afford the Union's proposal when he hadn't seen it. . . .

Mr. Moussallem again stated that if we were looking for even five cents more an hour the Company couldn't afford it and said that they were going to have to subcontract out the work and terminate the drilling. . . .

He [Moussallem] asked me what the employees were looking for. . . .

I told him that they wanted better winter coveralls, that their coveralls were very thin because they were working outside in the winter in adverse conditions all the time. . . .

He said that he didn't think that that would be a problem....

I brought up the employee's boot allowance. At the time it was 50 percent. I asked him if he would consider increasing the employee boot allowance because, again, they were always working in wet, adverse conditions, and they were going through a lot of boots. . . .

He said it would be something they would have to look at but he didn't think it would be a problem either. . . .

I told him that the employees had raised issues on the safety and the condition of the equipment. . . .

Mr. Moussallem said that the Company spent a lot of money on mechanics to maintain and repair the equipment. . . .

I asked him if he would consider giving the employees a little bit more time to inspect and do preventive maintenance on the equipment because safety was a concern for the employees. . . .

Mr. Moussallem said that that would be a good idea because the Employer was very concerned about safety too. . . .

I brought up the issue of HAZMAT, that the employees all wanted HAZMAT training... along with an annual 8-hour refresher because, at the time only the employees that were working on environmental sites were HAZMAT trained. The other employees who were doing geo-technical work did not have HAZMAT training even though they were coming in contact with substances... that they had absolutely no idea what they were

Mr. Moussallem said that that would probably be a good way to go. . . .

Mr. Moussallem asked who we were seeking to represent. . . .

I told him that we were interested in representing the drillers and helpers, [of] which there were nine. I referred him to the copy of authorization cards that I handed him.

 $^{^7}$ For purposes of brevity, I count Carpenter as an "employee" of the Respondent even though I ultimately agree with the Respondent that Carpenter was not employed by it during 2001.

⁸ "HAZMAT," an acronym for "hazardous materials" is spelled various ways in the transcript; I adopt this one.

He agreed that there was nine [card copies]. I told him that we were not interested in field technicians, secretaries, supervisors or managers as defined by the Act....

We asked Mr. Moussallem if we would have the opportunity to further negotiate and discuss these issues....

[H]e told us that we should come back around 7:30 when Kevin Jefferis would be available, that he would be the man we'd have to talk to because he was the principle regional manager. . . .

Moussallem returned to Simrayh the documents that Simrayh had given to him. Simrayh and Edwards then left. Simrayh testified that the meeting with Moussallem lasted "[a]bout 45 minutes."

Simrayh further testified that, about 7:30 a.m., he and Edwards returned to the Respondent's Naperville facility where they met Jefferis. Jefferis asked Simrayh and Edwards into his office. Edwards, instead, went into a restroom. When Simrayh got to Jefferis' office, Bucher was also present. According to Simrayh, he gave Jefferis the copies of the union authorization cards, the demand letter, and the voluntary recognition agreement form that he had previously given Moussallem. As Jefferis completed examining the union authorization cards, Edwards entered the office. Further according to Simrayh:

I explained to [Jefferis] that we had already met with Mr. Moussallem and we had discussed some of the employees' concerns, which were: they wanted better winter coveralls, they'd like to increase their boot allowance, which was only 50 percent at the time. That they would like to have a little bit more time to maintain the equipment, and that they all would like to have HAZMAT training....

Mr. Jefferis said these were "no big deal" [and that] this was "peanuts." . . .

I asked him, "Would you want to put your employees through the HAZMAT program?" . . .

He said, no problem. It's done. . . .

Mr. Edwards asked, "So, you are going to put all the employees through the HAZMAT program?" . . .

He said he would. . . .

He asked what we could do about training

I told him that the Union had an apprenticeship and skill-improvement program located in Plainfield and that we had [training] drill rigs there. We had qualified instructors there. And that we would strive to give the employees the best training possible to make it productive for the Company....

He asked if we had a PE, or a professional engineer, on staff at the training site. . . .

I told [Jefferis] that we really didn't have one on staff, but we would absolutely look into it to assist in the training if it would be helpful to the Company. . . .

Jefferis asked what kind of money we were looking for....

I told him we would be more than happy to negotiate a fair wage for his employees, that would be fair to the employees and to the Company. . . .

Mr. Jefferis indicated that not all his drillers were journeymen, that some of them would be more considered as apprentices. . . .

I told [Jefferis] that I agreed. That just about all of our contracts have apprenticeship programs. There's a graduated apprentice scale and that we would be more than happy to discuss who would be an apprentice and who would be a journeymen and that, yes, some of the employees would probably fall under the apprentice category. . . .

[Jefferis] asked me if we could provide qualified employees. . . .

I told him, "Absolutely." [And I told Jefferis that] he would have access to the Union's referral list and that he would have access to the journeymen driller operators. . . .

Mr. Jefferis commented on the punctuality of the employees.... He said that the guys had a problem getting to work on time....

I told him that [in] just about all of our contracts we have progressive steps of discipline [that are] laid out in black and white and that the employer has to adhere to them just as well as the employee does. . . .

[Jefferis again asked] how would we address punctuality. . . .

I told him that in most of our agreements we have what's called a 40-hour guarantee in which an employee is guaranteed 40 hours pay for the week once he starts on Monday morning. If the employee is late or is tardy one of those days, he forfeits that 40-hour guarantee and that will give incentive to the employees to be on time. . . .

Jefferis said that if he had to pay Union wages it wouldn't be fruitful for the Company to stay in drilling and they would have to terminate the drilling division. . . .

[Edwards] said that we took that as a direct threat due to Union organizing. . . .

[Jefferis] said that was not a threat, that was a promise. . . .

Mr. Jefferis then made the comment that if he had to go Union, the whole country had to go Union. . . .

I told him that we were not interested in the other shops. That we were only interested in the Naperville facility which falls within Local 150's jurisdiction. . . .

[Jefferis] inquired about our insurance program. He said that the current program he had was costing him about \$3.55 an hour per employee. . . .

I told him that the insurance provided by the Union was probably right around there and that having the Union providing the insurance would take the administrative headaches away from the Company, that the Union would take care of all the red tape.

Mr. Jefferis then requested a copy of our [health and welfare] benefit plan, which I told him I would send him something in the mail. . . .

He addressed the issue of the poor attitude of the employees, that they didn't have a very good work ethic and a very good work attitude. . . .

I told him that just by doing the Union [recognition?] that I would think the employees' attitude[s] would improve and that Local 150, as an organization, always

stressed eight hours' work for eight hours' paid. And that we would try to enforce that with the employees. And let them know that without the contract[or] we don't have a job, and we have to do a good job to keep them going. . . .

Mr. Jefferis said he would be in touch. I asked him if we could meet and negotiate or continue to negotiate or discussing these issues, these and others, and he [again] said that he would be in touch.

Simrayh testified that this meeting lasted "about an hour."

Simrayh further identified a copy of a letter that he sent to Jefferis the next day, February 20, by facsimile transmission (fax). In the letter, Simrayh essentially recites his version of what had happened on February 19, including: (1) Jefferis had met with Simrayh and Edwards "regarding the bargaining unit employees' terms and conditions of employment"; (2) Jefferis had examined the union authorization cards and had seen that the Union "unanimously" represents the bargaining unit employees; (3) "we were glad to begin bargaining"; (4) Jefferis had agreed to "provide better winter overalls, increase the boot allowance, and provide HAZMAT training to all⁹ employees"; (5) Simrayh and Edwards had agreed that bargaining unit employees "would be able to receive training at our apprentice and skill improvement site"; and (6) the Union "would look into getting a professional engineer to provide additional training." The letter then states that, "[a]s per your request, we will be providing you with copies of our health and welfare program." Simrayh's letter closes by stating that the Union was "available to continue with our negotiations on March 7th, 9th, and/or the 14th" and by asking Jefferis to contact Simrayh "so that we may set up a time and place to meet." Although the text of Simrayh's February 20 letter to Jefferis states that he would later be furnishing a copy of the Union's health and welfare plan, Simrayh testified (without contradiction) that he faxed a copy of the plan along with the letter.

Simrayh further identified a letter from Jefferis dated February 21 which Simrayh received on that date (by fax). Captioned "Re: Courtesy Call," the full text of Jefferis' letter is:

I would like to thank you for what you termed a "courtesy call" on the morning of Monday, February 19, 2001. Present in the room from Terracon were Mr. Stephen Bucher, Mr. Maroun Moussallem and myself. Present from the International Union of Operating Engineers Local No. 150 were Mr. Kenneth Edwards and you.

During the meeting we discussed several issues that you brought up regarding winter coveralls, boot allowance and HAZMAT training. As we indicated to you those seemed to be very minor issues. Because Terracon is a corporation neither Mr. Bucher, Mr. Moussallem or myself can change company policy without board approval. After your courtesy call, I did contract upper management to discuss the above issues, as well as the unionizing of our drilling department.

As you are aware, we (Terracon) [are?] is not familiar with the unionizing process, but again we understand that yesterday's visit by you was only a "courtesy call" and we

did not recognize your union and that no negotiations or bargaining has begun between Terracon and the Local 150. I also told you neither my staff nor I have power to recognize Local 150 or to bargain or negotiate for Terracon.

As stated above, I did contact upper management and they have indicated to me that they would contact you next week to discuss the above matters.

We appreciate the time you spent with us in your courtesy call of Monday, February 19, 2001.

(On cross-examination, Jefferis acknowledged that he had received and read Simrayh's February 20 fax before he sent this letter.)

Counsel for the General Counsel asked Simrayh to admit or deny the assertions in Jefferis' letter. Simrayh denied that he and Edwards were making a "courtesy call" when they went to Jefferis' office on February 19, and Simrayh flatly denied that he or Edwards used the term "courtesy call" while they were at the Respondent's facility. Simrayh denied that, during the February 19 meeting, Jefferis stated that neither he nor Moussallem could change company policies without approval of the Respondent's board of directors, and Simrayh denied that Jefferis stated at any time that neither he nor Moussallem had the "power to recognize Local 150 or to bargain or negotiate for" the Respondent. Simrayh further denied that, during the February 19 meeting, Jefferis stated that he would have to consult with the Respondent's board of directors before negotiating with the Union. Simrayh further denied that anyone from the Respondent's management thereafter contacted him "to discuss the above matters." (This last denial is not disputed.)

On cross-examination, Simrayh agreed that, during the two February 19 meetings, neither Jefferis or Moussallem expressly stated that they granted recognition to the Union as the collective-bargaining representative of any of the Respondent's employees. Simrayh further agreed that his pretrial affidavit states: "I handed a blank copy of the voluntary recognition agreement to Maroun Moussallem. He read it and said that he couldn't sign it right then." Simrayh further acknowledged that he never received from the Respondent any signed voluntary recognition agreement.

Edwards testified essentially consistent with Simrayh about the content of the meetings that he and Simrayh had with Moussallem, Jefferis, and Bucher on February 19.

In reference to the General Counsel's contentions that Jefferis and Moussallem had the authority to recognize or bargain with the Union, the parties stipulated that:

In February 2001 contracts between Terracon and suppliers necessary for the operation of the Naperville office (which [were] not project-related) [were] signed by the office manager Maroun Moussallem [for] up to \$1,000. Contracts in excess of \$1,000 but less than \$10,000 [were] cosigned by the office manager and the division manager. Contracts in excess of \$10,000 [were] signed in the corporate office. There have been, from time to time, deviations from this policy.

The General Counsel also placed in evidence a copy of the Respondent's position description for regional managers such as Jefferis; the position description first states: "Reports to:

⁹ Emphasis in original.

Operating Company President, Chief Operating Officer (COO) or Division Manager." Next is: "Position Supervises: Office Managers, Technical Consultants and designated staff." Under "Essential Functions and Duties," there is a lengthy list that includes: "Provides technical expertise and back-up management assistance to offices when requested or as needs develop. . . . Assists the offices in the administration of annual compensation, base salaries and bonuses, for their employee groups and evaluates recommendations to the President for needed adjustments. . . . Provides direction and decisions to Office Managers and assists each in gaining support from corporate staff or other operating units."

The Respondent's position description for office managers such as Moussallem first states: "Reports to: [Regional] Manager¹⁰ or another office manager." Next is "Position Supervises: Key Technical and Administrative Staff." Then, under "General Responsibilities," the position description states:

Under the general direction of the Division¹¹ or [other?] Office Manager, plans, organizes, directs and coordinates all the activities (administrative and technical) of a small to medium-sized office. This includes general profit/loss management practices, employee supervision, project management, client relations[,] client development, and new business development. Responsible for general leasehold improvement, project and office equipment, and proper utilization of all personnel under his/her authority to ensure that Company mission is accomplished to the full satisfaction of clients.

Listed under "Essential Functions and Duties" of the office manager are 11 areas of management including "contract administration, human resources management, regulatory compliance, [and] health and safety practices."

b. Evidence presented by the Respondent

On direct examination, Moussallem testified that, as office manager:

My duties are to make sure I'm responsible for the profit [and] loss of the office. To make sure the office operation runs smoothly as far as hiring people to cover jobs. I'm responsible for marketing our services, client relations, proposal preparation, typical office management.

Moussallem testified that he arrived at work at 6 a.m. on February 19, and when he got to the lobby of the Naperville facility:

I saw the drillers standing all together and there were two gentlemen that I didn't recognize standing with the drillers

So I approached them and I said, "What's going on; can I help you?" And the two gentlemen approached me ... and they said, "Your drillers have signed cards." And they showed me some copies of cards and they would

like the Local 150 Union to represent them and [asked,] "Can we talk?" . . .

In his office, Simrayh stated that "the majority of your drillers have signed union cards asking for representation," and asked Moussallem to sign the voluntary recognition agreement. Moussallem testified, however, "But I didn't say anything." Moussallem continued:

And then they were saying something about the people had some gripes they wanted to discuss... specifically about coveralls that the Company provided coveralls; they did not think they were good. They were not winterized coveralls. They didn't have any insulation or lining.

[The union representatives then brought up the] issue about the boot allowance that, you know, the Company only pays 50 percent. And [they brought up] the issue about HAZMAT training. I don't think we went into depth into that subject. . . .

[Simrayh then said] that people would like a complete allowance on the boots, not just 50 percent company paid allowance. And when he mentioned these I, I pretty much said, "They don't seem to be big deals. This is what the Company handbook says." I mean, that's the allowance that they had.

And then I recall saying that our competition in this area [does] not have any union drillers, all of the engineering firms. And [I said,] "If we go union I think we'll be priced out of the market and they will be doing most of the work."

Moussallem testified that his conversation with Simrayh and Edwards lasted, "20 to 30 minutes." (Moussallem testified that he did not notice Carpenter's card among the copies that the Union presented February 19, although he did admit that he "flipped through the pages" that the Union had proffered.) Moussallem further testified that he then telephoned Jefferis who was on the way to work; he only told Jefferis that union representatives had been there, and Jefferis only said, "Really?" Moussallem acknowledged, however, that, after Simrayh and Edwards left and before Jefferis arrived, Bucher asked him who the visitors had been; and Moussallem admitted that he then told Bucher that they were union representatives and that they were seeking recognition of the drillers and helpers.

After Simrayh and Edwards came back to the facility and went into Jefferis' office, Moussallem went to join them. According to Moussallem:

I believe at that time it was Stan [Simrayh who] was presenting the, the copies of the cards to Mr. Jefferis. . . . He [Simrayh] was saying they would like to represent our guys and Terracon would recognize them. They have a few gripes that they want to discuss with Mr. Jefferis. And they went into the . . . [topics of] boots, the boot allowance, the coveralls quality and the HAZMAT training.

The remainder of Moussallem's testimony about the union representatives' meeting with Jefferis is essentially consistent with Jefferis' testimony, infra. Moussallem estimated the length of that meeting at "about 30 to 40 minutes."

¹⁰ The document here states "Division Manager." This is plainly an error and, apparently, "regional manager" (such as Jefferis) was intended, as indicated by the position description of a regional manager quoted above and testimony at trial.

¹¹ Id.

Jefferis, when called by the Respondent, testified that drilling crews consist of "[a] driller and a drill helper." But then Jefferis testified that, although there is a written "position description" for a driller, there is no such document for a drill helper because "[t]he drill helper could be a driller, it could be a technician, it could be a geologist, it could be an engineer, it could be a professional engineer."

Jefferis testified that members of the Respondent's board of directors, such as himself, "don't deal with the operating policies; we deal with mostly corporate policies that are not operational." The number of board members varies between 10 and 12; one board member gets one vote on matters that are taken up by the board. Jefferis denied the ability, by himself, to bind the board of directors to anything. As Illinois regional manager, Jefferis could hire employees up to \$45,000 annual salary and authorize purchases up to \$10,000. Hirings and transactions greater than those limits went to the Respondent's Northeast division manager, Whited. Jefferis could hire no employees in excess of the numbers set by Whited. Jefferis testified that the Respondent recognizes no unions and that he had no authority to recognize a union on his own.

Jefferis identified documentation that the Respondent's boot policy (50 percent, once per year, with exceptions as set by the office manager) is set by a corporate policy manual. Jefferis further testified that the Respondent establishes the allowance for coveralls (two pairs, one for summer and one for winter). Jefferis agreed that some, but not all, employees receive a 40-hour HAZMAT training course; Jefferis did not testify that the Respondent's upper management determines who receives the training (although, as will be seen, Jefferis did testify that he told Simrayh and Edwards that "Corporate" determines who receives the training as well as what the boot and coveralls allowances are).

Jefferis testified that, when he was on the way to work on February 19, Moussallem telephoned him "and said that the Union had been there, and they were looking for me, and they had papers." Jefferis testified that when he arrived:

[Moussallem] said the documents that Stan had given him were a letter to me, and then a copy of signature cards, and then a voluntary request form. 12...

I asked him what they said in addition to that, he said that they talked about boots, coveralls, and forty-hour training. I kind of cut him short because I didn't have a lot of time. But, what I did tell him was, after he told me that the Union was coming back, I said, I want you in the meeting.

Jefferis testified that, when Simrayh and Edwards arrived, Simrayh "said he was here as a courtesy call." After Jefferis, Moussallem, Bucher, Simrayh and Edwards had gathered in Jefferis' office, further according to Jefferis:

[Simrayh] gave me a letter addressed to me, from him, He gave me copies of signature cards, and he gave me a voluntary request form. . . . He said he had the majority of our drillers and helpers, and they would like \dots to represent them. \dots

I think he took them out of a manilla envelope and handed them to me.... I didn't say anything, I picked up the documents and looked at them for ten or 15 seconds....

I think he may have said, "You can see it's a majority of your people." . . .

I didn't say anything. I did notice that Ryan Carpenter's signature was on there.... I didn't say anything about it....

I think Stan went into, the guys had some grievances, and started talking about the grievances. . . . I think first we talked about coveralls. . . .

Stan said the guys said the coveralls were cotton and they were very light, and also said that they would like canvas type coveralls such as Carhart's [brand]....

I said it seemed minor. . . .

Next, he went into boots, and the guys, he said the guys would like to have full reimbursement for boots.

And, again, I said that that was minor. . . .

And then Stan said that all the guys would like to have HAZMAT training.

I told him that we do have HAZMAT training, but only for part of our guys.

In the end, I said, "All these things seemed to be peanuts, but they are corporate policies." I don't think Stan said anything after I said that....

Then we went into kind of a different mode, and I asked him, "What can the Union do for us?"

And Stan said, "We have a training facility in Plainfield, Illinois, where we train all of our people."

I asked about drill rigs; he said that they had one or two truck drill rigs. I asked about altering drill rigs; he said they do not have altering drill rigs, but he could look into it.

Stan offered that he had a client list that he could give us. Some place in the conversation Stan said that the guys would like to do more maintenance in the morning. I had indicated to him that we had spent a lot of money on maintenance, both in-house and out-house. . . .

Steve Bucher did bring up the professional engineer.... Stan did say that he would look into that....

After that part of the conversation I told Stan that we drilled in less than 50 percent of our offices, where we didn't drill we subcontracted. And then Ken said, "Is that a threat?"

I said, "That's a fact." . . .

People got quiet and then it was almost the end of it. And Stan said he would like to keep talking. And I said that we'll have Corporate get back to you; we don't have the authority to talk for Corporate. . . .

I think we shook hands, and then everybody left.

Jefferis testified that the meeting with Simrayh and Edwards lasted "about 30 minutes." Jefferis testified that "immediately" after Simrayh and Edwards left his office, he contacted Larry Davidson, the Respondent's CEO, and: "I told him that the Union had been here and they were seeking recognition."

¹² Jefferis consistently referred to the form entitled "Voluntary Recognition Agreement" as a "voluntary request form."

Davidson told Jefferis to hire a labor lawyer and, after checking around, hired the counsel for the Respondent who appeared at trial.

On cross-examination, Jefferis agreed that he had retained the documents that Simrayh and Edwards had given him on February 19.

Bucher, manager of the Respondent's geotechnical engineering group, testified that on the morning of February 19, he arrived at 6:05 a.m. He went to the conference room where a training session had been scheduled to start at 6. Matt Catlin, an environmental engineer, had already started the training session, and the employees "were all wearing Local 150 hats." Bucher noticed that Moussallem was not present as he should have been. Bucher went to Moussallem's office and saw that he was talking to Simrayh and Edwards (whose identities Bucher learned later in the morning). Bucher went back to the training session. About 7:50, Jefferis asked him to come to his office with union representatives for a meeting that was to begin at 8 a.m. Further according to Bucher, at that meeting:

Kevin said, you know, "What can we do for you?"

And the union reps said, "Well, we represent your drillers and here's the copies of their authorization cards." Kevin had it on his desk. I know I glanced at it from over his shoulder. There was some discussion of grievances or beefs, I guess that our employees had related to coveralls, work boots. . . .

The remainder of Bucher's testimony about the meeting was essentially consistent with Jefferis' testimony.

c. Resolutions

(1) The appropriate unit and its size; the Union's majority status

The Respondent states on brief:

On February 19, 2001, they [Simrayh and Edwards] presented the Company with authorization cards signed by nine alleged drillers and drill helpers. The Union did not demonstrate majority status through these cards, however, because the actual size of the bargaining unit greatly exceeded the nine individuals who signed the authorization cards. Specifically, the Company typically assigns two individuals to a drill group: a driller and drill helper. However, the Company does not have a position description for "drill helper." Rather, any number of positions can serve as "drill helpers," including another driller, a technician, a geologist, or a professional engineer.

At the hearing, Respondent was denied the opportunity to produce evidence establishing the large number of individuals who had served as "drill helpers" on Naperville drill rigs in 2000 and 2001. (Resp. Rej. Ex. 24.) Had Respondent been afforded this opportunity, the Union's failure to establish majority status would be clear. [Transcript citations omitted.]

The Respondent's contention that the Union did not demand recognition in an appropriate unit because the Respondent has no "position description" for a driller's helper is, at best, specious. Of course, the Respondent's library of position descrip-

tions is hardly controlling; an employer may have any number of positions for which it has no written description. Moreover, the Respondent's witnesses did not challenge the testimonies of Salazar, Reyez, and Rodriguez that they were, at least for a time, classified as drillers' helpers. Also, the supervisors freely used the term "helper" themselves in testifying about specific individuals. And in evidence are various memoranda that Jefferis and Moussallem that are addressed to "Drillers and Helpers," or "Drillers, Drill Helpers and Project Engineers" and such. Additionally, the fact that some other employees (engineers or others) may sometimes help a driller¹³ does not make those employees helpers; they are still engineers or otherwise. Finally, on brief the Respondent repeatedly refers to certain employees as "drill helpers" or "driller helpers," including the topic line: "TERRACON DID NOT VIOLATE SECTIONS 8(A)(1) AND 8(A)(5) WHEN IT FIXED DRILLER AND DRILL HELPER START TIMES." At another point in its brief, the Respondent states:

Beginning in mid-January 2001, the drillers and drill helpers from Terracon's Naperville office began unionization efforts. Various Naperville drillers and drill helpers met with Union representatives at the Union hall on January 13, 2001 and February 10 and 17, 2001, to sign authorization cards and develop a plan for seeking voluntary recognition.

The Respondent assuredly did not wish to indicate that engineers or others who sometimes helped drillers participated in the organizational attempt. That is, there were clearly employees who were identified as helpers; they worked constantly with drillers under the same immediate supervision; and they enjoyed the same terms and conditions of employment as the drillers. The helpers therefore exist as a classification and they have a strong community of interest with the drillers. The drilling helpers are accordingly to be included in the same bargaining unit with the drillers under Section 9(b), and no other employees were shown to have a community of interest with the drillers and helpers. If therefore find and conclude that the Union's requested bargaining unit of the Respondent's Naperville drillers and drilling helpers is a unit appropriate for bargaining under the Act.

The Respondent's argument that the size of the unit was not established is equally unavailing. I rejected Respondent's Exhibit 24 on the grounds of relevance. The exhibit is entitled "List of employees Who Worked on Naperville Rigs in 2000 and 2001." The exhibit is a document that lists the names of 71 employees (including Carpenter) who worked on the rigs that were usually garaged at Naperville during the (entire) years of 2000 and 2001. The list is divided into groups indicating where the employees are usually assigned: Naperville (36 employees), Rockford (9), Bloomington (9), Cedar Rapids, Iowa (3), Mokena (7), and Lake Zurich (6). The document was not identified as a summary that is admissible under Federal Rules of Evidence 1006 because it was offered only through Moussallem who testified that, to compose it, he relied, in part, on oral

¹³ The Respondent makes no suggestion of how often this may oc-

cur.

14 There was no evidence of interchange between the Naperville drillers and helpers and those of the four other Illinois facilities under Jefferis' ultimate supervision.

reports of Bucher and managers at other facilities of the Respondent; Moussallem did not testify that he independently reviewed all of the business records that underlay the summary, and he therefore could not attest to its accuracy. Moreover, assuming that the exhibit accurately reflected what its title indicates, the fact that an employee who is regularly assigned to the Respondent's Rockford (or Bloomington, or Cedar Rapids, or Mokena, or Lake Zurich) facility works at least once during a 2-year period on a rig that is usually garaged at Naperville does not, of itself, create a community of interest between the Rockford employee and the Naperville employees sufficient to require him to be included in the same unit with the Naperville employees. Additionally, even as a record of who was employed at the Naperville facility at relevant times, the exhibit is incompetent. No dates are indicated for the employment of the 36 indicated employees. For all the exhibit shows, those 36 employees (including the 9 from whom the Union secured authorization cards) could have worked for only minimal periods of time on the Naperville rigs during that 2-year period, or they could have quit or been discharged before the Union's demand for recognition, or they may not have been hired until thereafter. Therefore, the exhibit was so vague as to be meaningless, and it was properly rejected, as well, under Federal Rules of Evidence 403.

I do, however, agree with the Respondent that Carpenter should not be included in the unit. Carpenter worked for the Respondent during 2000, but he was discharged when he lost his driver's license that year. Carpenter later applied to be rehired, but Moussallem told him he would not be rehired until he secured a valid commercial driver's license. Carpenter never presented such a license to Moussallem, and he was not re-hired. The Union representatives (or some of the Respondent's employees who were employed in February 2001) apparently asked Carpenter to come to the organizational meetings where he signed a union authorization card, and Carpenter also came with the group that Simrayh and Edwards brought with them on February 19 to demand recognition. And Carpenter even went into the training meeting that the Respondent had scheduled for that date, and he was allowed to sit through that meeting. Nevertheless, Carpenter was never put back on the payroll, and he did not work for the Respondent during 2001. Accordingly, Carpenter's participation in the organizational attempt, and his union authorization card, are not to be considered in determining the Union's majority status.

The Respondent therefore employed eight drillers and helpers when the Union made its initial request to bargain on February 19. By that date, all eight of those employees had signed single-purpose union authorization cards designating the Union as their collective-bargaining representative. Additionally, when Simrayh and Edwards went to the Respondent's facility to demand recognition, all eight of these employees accompanied them. And, in doing so, the employees wore union caps with the Union's logo prominently displayed on the crowns, further demonstrating their support for the Union as their collective-bargaining representative. I therefore find and conclude that on February 19 the Union represented a majority of the

Respondent's drillers and helpers in a unit that is appropriate for bargaining under Section 9(b). 15

(2) Agency of Jefferis and Moussallem

The General Counsel and the Charging Party contend that Jefferis and Moussallem had both actual and apparent authorities, as the Respondent's agents, to bind it to a commitment of recognition. The Respondent contends that actions such as a grant of recognition must be authorized by its board of directors. The Respondent, however, cites no corporate document limiting managers such as Jefferis or Moussallem from making such commitments. Moreover, Section 2(13) of the Act provides that:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

In *Richmond Toyota*, 287 NLRB 130 (1987), the Board found that Loretta Pao, the employer's vice president and general manager had "at the very least, apparent authority to recognize the Union as the exclusive bargaining agent of the respondent's employees." The Board entered this finding not on Pao's titles but on the fact that Pao was "in charge of the day-to-day operations and is the highest ranking official at its facility." In *Opportunity Homes, Inc.*, 315 NLRB 1210, 1217 (1994), enfd. 101 F.3d 1515 (6th Cir. 1996), the Board adopted the administrative law judge's citations of *Richmond Toyota* and *Nemacolin Country Club*, 291 NLRB 456 (1988), to emphasize:

Otherwise, it is well established that an employer is bound by the acts of those of its officials who are in charge of the dayto-day operations at its facility and who possess actual authority, or at the very least, apparent authority, with respect to labor relations matters.

As the position description of the Respondent's office managers states, Moussallem was in charge of the Respondent's Naperville day-to-day operations, including "human resources management, regulatory compliance, [and] health and safety practices." Jefferis was Moussallem's supervisor and had at least this much authority. Also, Jefferis had the additional responsibility of "evaluat[ing] recommendations to the President for needed adjustments." (Recommendations, of course, could be the result of collective bargaining.) Jefferis worked almost constantly at the Naperville facility, and he was necessarily as much in charge of the workforce as Moussallem. Moreover, Jefferis had the authority to hire employees at up to \$45,000 per year in salary and had the authority to commit the Respondent to purchases as high as \$10,000. Therefore, the clear language of Richmond Toyota and Opportunity Homes requires the finding that Jefferis and Moussallem held "at least" apparent au-

¹⁵ In his letter of February 20, Simrayh represented that Jefferis examined the union authorization cards and saw that the Union "unanimously" represented the bargaining unit employees; in Jefferis' carefully drafted response of February 21, however, there is no denial that the Union represented a majority of the bargaining unit employees, "unanimously" or otherwise.

thority to bind the Respondent. Additionally, it is to be noted that the administrative law judge in Opportunity Homes rejected the employer's contention that its board of directors must expressly authorize actions such as a grant of recognition. In so doing, the judge noted that the Respondent's board of directors had known of its alleged agent's grant of recognition but had done nothing to repudiate it. In this case Jefferis, himself, was not only a member of the Respondent's board of directors but he promptly notified the Respondent's CEO Davidson that the Union was claiming that it represented a majority of the Respondent's Naperville employees and demanding recognition. Nevertheless, through time of trial, neither Davidson nor any other member of the Respondent's board of directors, nor anyone purporting acting on that board's behalf, did the slightest thing to disavow the actions that Jefferis (and Moussallem) had taken in regard to the Union's demand for recognition.¹

I therefore find and conclude that Jefferis and Moussallem possessed apparent and actual authorities to grant recognition to the Union as the collective-bargaining representative of the Respondent's unit of Naperville drillers and helpers.¹⁷

(3) Whether recognition was granted

(a) Credibility resolutions

It is undisputed that on February 19: (1) Simrayh and Edwards came to the Respondent's facility with all of the unit employees (who were wearing caps that bore prominent union logos); (2) Simrayh and Edwards presented Jefferis and Moussallem with a written demand for recognition; (3) Simrayh and Edwards also told Jefferis and Moussallem that they were there to request recognition (preferably in the written form of the voluntary recognition agreement): (4) Simravh and Edwards presented union authorization cards that had been signed by all of the unit employees; and (5) Jefferis and Moussallem examined each card; then (6) certain terms and conditions of employment of the unit employees were discussed among Simrayh and Edwards and Jefferis, Moussallem, and Bucher. According to Jefferis, after discussions of those topics, he told Simrayh and Edwards that "[a]ll these things seemed to be peanuts, but they are Corporate policies." Jefferis further testified that he ended his meeting with Simrayh and Edwards by stating: "[W]e'll have Corporate get back to you; we don't have the authority to talk for Corporate." Simrayh and Edwards testified that Jefferis did not refer to "Corporate policies" except in regard to the amount of the employees' boot allowance and that he ended the meeting by stating that he would get back to the Union.

It was no less than five times in his letter of February 21 to Simravh that Jefferis referred to the February 19 visit by Simrayh and Edwards as a "courtesy call." Simrayh credibly denied that he used the term "courtesy call" when he introduced himself to Jefferis, but even if Simrayh had used that term Jefferis knew that the Union had not been to the Respondent's Naperville facility just to extend a courtesy to him or to the Respondent (just as one knows that an unwelcome telephone solicitor is not actually extending a courtesy to you even though he opens his spiel by saying that he is calling as a "courtesy"). According to the testimonies of both Jefferis and Moussallem. Jefferis knew that Simrayh and Edwards had been there on February 19, not as a courtesy but because they wanted something significant, recognition, and bargaining. That is, Jefferis tailored his letter to belittle the significance of the February 19 visit, and I believe that Jefferis and Moussallem (and Bucher) tailored their disputed testimonies with the same objective. And, at every conflict, I credit Simrayh and Edwards over the Respondent's witnesses.

I do not believe that Jefferis ended the February 19 meeting by saying: "We'll have Corporate get back to you; we don't have the authority to talk for Corporate." I believe that this testimony, like much of Jefferis' testimony, was only what he (and Moussallem and Bucher, who supported their superior) wished that he had said. Jefferis would not have gone into the terms and conditions of employment of the unit employees as far as he did, and he certainly would not have asked what the Union could do "for us," as he also did, if on February 19 he had any thought of turning the issue of recognition over to higher corporate authorities. I have no difficulty in finding that, early on February 19, Moussallem told Jefferis (either by telephone before Jefferis arrived at the facility or in person after Jefferis arrived) that Simrayh and Edwards had been there with eight union cap-wearing employees and Carpenter, that they had demanded recognition and that they had displayed the union authorization cards to him. Jefferis, however, did not then call Corporate and ask for advice on what to do. And Jefferis, in fact, did bring Simrayh and Edwards into his office to discuss their mission. I therefore believe that Jefferis thought he could, and would, handle the issue himself, and I believe that he sought to do so. I therefore credit the testimonies of Simrayh and Edwards that Jefferis used the term "Corporate" only in reference to the boot-reimbursement policy and that Jefferis closed the second February 19 meeting by saying that he (not "Corporate") would "be in touch." I further credit the testimonies of Simrayh and Edwards that Jefferis did not say anything to the effect that he could not change policies that had theretofore been set by "Corporate" without approval of the Respondent's board of directors.

In summary, I find that on February 19:

Simrayh and Edwards appeared at the Respondent's Naperville facility about 6 a.m. with nine individuals, eight of whom were then employed by the Respondent (Carpenter being the exception). Those eight employees were the Respondent's drillers and helpers, and they constituted all of the employees in

¹⁶ The Respondent's brief reflects a massive effort of research (even to the extent of including citations of many unapproved administrative law judges' decisions). Nevertheless, in its argument on the agency issue the Respondent acknowledges neither *Richmond Toyota* nor *Opportunity Homes*. In fact, the only Board case on point that the Respondent does cite is *Kidd Electric*, 313 NLRB 1178 (1994), which found the agency status to exist under similar circumstances.

¹⁷ A different result was reached in *Wometco-Lathrop Co.*, 225 NLRB 686 (1976), where the day-to-day management was of a much smaller group of employees. In that case, the manager who granted recognition supervised only 18 employees. Similarly, in *John Oster Service Co.*, 173 NLRB 673 (1968), the individual who originally granted recognition supervised only five employees. In this case, Jefferis and Moussallem supervised 43 employees at the Naperville facility (albeit only eight in the requested bargaining unit).

a unit that is appropriate for bargaining. Each of the drillers and helpers was wearing a union logo cap that demonstrated that he agreed with the express purpose of Simrayh and Edwards in going to the Naperville facility, which was to secure recognition as the collective-bargaining representative of the drillers and helpers. Simrayh and Edwards first met with Moussallem who, as well as seeing all unit employees wearing the union caps, examined the union authorization cards signed by all of the unit employees. Moussallem examined the voluntary recognition agreement form; the form did not specify the unit being requested, but when Moussallem asked who the Union was seeking to represent, Simrayh told him that it was a unit of Naperville drillers and helpers. Moussallem conceded that each of the Respondent's drillers and helpers had signed a union authorization card.¹⁸ Moussallem, however, did not expressly concede that, by the fact of the Union's card majority (or anything else), the Union had proved its majority status. Moussallem further did not say that he would, or that he did, recognize the Union, and he did not sign the voluntary recognition agreement form. Moussallem did, however, discuss certain terms and conditions of employment of the employees with Simrayh and Edwards. That discussion included: Moussallem stated that the Respondent could not pay the employees even five cents more per hour; Moussallem asked what the employees wanted that prompted them to seek union recognition; when told that the employees wanted better winter coveralls, Moussallem said that would not be a problem; when told that the employees wanted a greater reimbursement for boots because they were working in adverse conditions and were going through several pairs a year, Moussallem said that the Respondent would look at a better boot allowance, but he did not think that would be a problem either; when asked if the Respondent would give the employees more time for maintenance of the equipment, Moussallem agreed that that would be a good idea because the Respondent was concerned about safety too; when asked if all employees could have HAZMAT training, Moussallem replied that that would be a good way to go. The meeting ended with Moussallem's telling Simrayh and Edwards that they should return later to talk to Jefferis later in the morning.

When Jefferis arrived at the Respondent's Naperville facility on February 19, Moussallem informed him of what had transpired with the unit employees and Simrayh and Edwards. When Simrayh and Edwards returned to the facility, Simrayh did not say that he and Edwards were there as a "courtesy." Simrayh and Edwards presented Jefferis with the union authorization cards, a letter demanding recognition and the voluntary recognition agreement form, all of which Jefferis examined. Jefferis conceded that each of the Respondent's drillers and helpers had signed a union authorization card. Jefferis, however, did not expressly concede that, by the fact of the Union's card majority (or anything else), the Union had proved its majority status. Jefferis did not say that he would, or that he

did, recognize the Union, and he did not sign the voluntary recognition agreement form. Jefferis did, however, discuss certain terms and conditions of employment of the unit employees with Simrayh and Edwards. That discussion included: Simravh told Jefferis that the unit employees had "grievances": they wanted better winter coveralls, an increase in their boot allowance, more maintenance time, and HAZMAT training for all employees. Jefferis replied that these items were "peanuts," but, except for the boot allowance, he did not state that they were controlled by previously issued corporate policies or that he could not bargain about those issues. Jefferis agreed that all employees would receive HAZMAT training, and he asked, and was told, what the Union could do to train the employees. Jefferis proposed that the Union hire a professional engineer to assist in training, and the Union agreed to look into that possibility. Jefferis asked what kind of wage-rate changes the Union was seeking, but Simrayh did not give Jefferis a specific proposal. Jefferis proposed that some of the employees would be considered apprentices in any wage progression plan, and Simrayh agreed. Jefferis asked if the Union could refer qualified employees, and Simrayh assured him that it could. Jefferis asked what the Union could do about employee punctuality and morale, and Simrayh proposed a progressive disciplinary system and attendance policy that awarded good attendance. Jefferis told Simrayh and Edwards what his employee insurance costs were, and Simrayh stated that the Union's proposal would have about the same cost. Jefferis asked for, and ultimately received, a copy of the Union's health and welfare program. Jefferis concluded the meeting by stating that he would be "in touch" with Simrayh and Edwards. Jefferis did not stated that "Corporate" would be in touch or that he had no authority to engage in further discussions with the Union.

(b) Applicable law and conclusions

On August 4 and 7, 1978, the Board issued its decisions in Brown & Connolly, Inc., 237 NLRB 271 (1978), and Jerr-Dan Corp., 237 NLRB 302 (1978), respectively. In Brown & Connolly, the Board found a violation of Section 8(a)(5) on the factual findings that: (1) Brown, the employer's president, received a clear demonstration that a majority of the unit employees had designated the union as their collective-bargaining representative when the employees accompanied two union representatives as they presented Brown with a demand for recognition, and the employees were wearing union buttons as they did so; (2) Brown expressly acknowledged that the union did represent a majority; (3) Brown stated that he did recognize the union as the employees' collective-bargaining representative; and (4) Brown further agreed to meet for negotiations during the following week. Brown did meet with the union a week later, but only to say that he refused to bargain with the union then and thereafter. In finding a violation on these findings, the Board adopted the statement of the law by Administrative Law Judge David S. Davidson that:

Once voluntary recognition has been granted to a majority union, the Union becomes exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates

¹⁸ One of the presented cards was also signed by Carpenter who was not then employed, but presence of the surplus card dilutes the significance of neither Simrayh's representation that all of the Respondent's drillers and helpers had signed union authorization cards nor Moussallem's acknowledgment of that fact.

the employer's bargaining obligation.¹¹ Evidence that an employer has commenced bargaining or has taken other affirmative action consistent with its recognition of the Union aids in resolving the evidentiary question as to whether recognition was granted. However, once the fact of recognition is established, such additional evidence is not required, for the bargaining obligation arises on voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed.¹²

11 Toltec Metals, Inc., 201 NLRB 952 (1973), enfd. 490 F.2d 1122 (C.A. 3, 1974); Moisi & Son Trucking, Inc., 197 NLRB 198 (1972); Broad Street Hospital and Medical Center, 182 NLRB 302 (1970), enfd. 452 F.2d 302 (C.A. 3, 1971); Universal Gear Service Corporation, 157 NLRB 1169 (1966), enfd. 394 F.2d 396 (C.A. 6, 1968)

(C.A. 6, 1968).

12 Gogin Trucking, 229 NLRB 529 (1977). See Keller Plastics
Eastern, Inc., 157 NLRB 583 (1966); Whitemarsh Nursing Center, 209 NLRB 873 (1974); Wavecrest Home for Adults, 217
NLRB 227 (1975); Rockwell International Corporation, 220
NLRB 1262 (1975).

The Board therefore adopted Judge Davidson's holding (237 NLRB at 275) that: "When Brown refused to bargain with the Union on September 21, he withdrew the recognition he had granted on September 14 and reneged on his commitment to bargain. No time for bargaining had elapsed, and Respondent's refusal to bargain on and after September 21 therefore violated Section 8(a)(5) and (1) of the Act."

In the accompanying case of *Jerr-Dan*, the Board reversed another administrative law judge's reasoning that, although the employer's agent had expressly admitted that the union possessed a majority status by virtue of authorization cards that had been presented to him and had agreed to recognize the union and bargain with it, that employer did not violate Section 8(a)(5) when it thereafter withdrew recognition "before... substantial action was taken in confirmation of, or in reliance on, the recognition..." In disavowing the judge's reasoning, the Board stated:

The key is not, as the Administrative Law Judge would have it, further evidence of recognition. Rather, the key is the original commitment of the employer to bargain on some demonstrable showing of majority. That showing was made here by the Union and that commitment was made by Respondent when it agreed to begin bargaining. Once that commitment was made, Respondent could not unilaterally withdraw its recognition, and to do so was a violation of the Act

That is, the Board reaffirmed the conclusion of *Brown & Con-nolly* that bargaining, if shown, fortifies a conclusion that the employer has granted recognition, but it is not necessary to prove a violation of Section 8(a)(5) if recognition is thereafter withdrawn

On brief, the Respondent argues that both *Brown & Connolly*, supra, and *Jerr-Dan*, supra, have been implicitly overruled and that the law now is that a commitment to bargain means nothing unless the employer has, as well, expressly acknowledged that a union represents a majority of the unit employees. Noting only *Jerr-Dan*, *Brown & Connolly*, and a few

unpublished administrative law judges' decisions, the Respondent states (p. 61):

In fact, to the extent the above-cited cases find union recognition if the employer makes a statement indicating a majority of the employees have signed authorization cards and/or desire a union, the cases pre-date recent Board law which holds otherwise. Specifically, as the Board recently stated in *Jefferson Smurfit*, [Corp.] an employer must "expressly consent to permit determination of majority status by a means other than a Board election." 331 NLRB [809] (emphasis added [in the Respondent's brief]).

The relevant facts of *Jefferson Smurfit Corp.*, 331 NLRB 809 (2000), will be discussed infra. It suffices to say at this point, however, that the complete sentence from which the Respondent extracted this alleged quote is no more than that:

Here, the Respondent did not expressly consent to permit determination of majority status by a means other than a Board election.

That is, in *Jefferson Smurfit* the Board only found that the employer that was then before it did not "expressly" waive its right to a Board election. But the Board did not, as the Respondent's brief argues, rule that an express waiver "must" be found before an employer can be held to violate Section 8(a)(5) by refusing to recognize and bargain with a union that has demonstrated its majority status. Of course, if the Respondent's half-quote of *Jefferson Smurfit* were the law, an employer who only refrains from expressly acknowledging a union's majority status could avoid a bargaining order, no matter how strong its commitment to meet and bargain and no matter how much bargaining it actually engaged in, and *Brown & Connolly* and *Jerr-Dan* assuredly would be overruled. Presumably, however, if the Board had meant to overrule such longstanding authorities it would not have done so merely by implication.

As well as misquoting *Jefferson Smurfit* to argue that express acknowledgment of majority status is required in circumstances such as these, ¹⁹ the Respondent ignores authority that is directly to the contrary. In Richmond Toyota, 287 NLRB 130 (1987), union representatives presented to one employer's agent, Loretta Pao, the union's card majority. On the completion of Pao's examination of the authorization cards, the union's representatives asked for a meeting for the purposes of collective bargaining. Pao answered that another agent of the employer, Pao's husband Gordon, would meet with the union at some time during the following week. Gordon, however, refused to meet with the union, and a Section 8(a)(5) complaint issued. In reversing the administrative law judge who had dismissed the complaint, the Board, at 287 NLRB at 131, found that Loretta Pao's conduct constituted a "commitment to negotiate," and the Board further observed:

¹⁹ In this case, when the Union made its demand for recognition, it also made the required demonstration of majority status by having the accompaniment of all of the unit employees, each of whom was wearing prounion insignia, as well as by having its card majority examined by both Jefferis and Moussallem, see *Brown & Connolly*, supra.

The judge interprets [Loretta] Pao's statements, in part, by noting that she never acknowledged the Union's majority status. As indicated above, however, Pao consented to future negotiations with the Union after verifying the authenticity of the Union's authorization cards. Because Pao only questioned the Union's majority status before examining and verifying the authorization cards, and because she consented to future negotiations after authenticating the cards, we find that she acknowledged the Union's majority status.

That is, under *Richmond Toyota*, it is more than clear that an express acknowledgment of majority status is not required if an employer agrees to meet for collective-bargaining purposes after being shown evidence of that majority status.

Richmond Toyota further requires a finding here that the Respondent, by Moussallem and Jefferis, made a "commitment to negotiate" with the Union after examining the Union's authorization card majority. When the union representative in Richmond Toyota asked for bargaining sessions, Loretta Pao did not refuse; instead, she replied that the union representatives should come back later and meet with another of the employer's agents (her husband, Gordon). In this case, Moussallem filled the role of Loretta Pao, and Jefferis filled the role of Gordon Pao. Moussallem, like Loretta, examined the Union's card majority. Moussallem, like Loretta, was thereafter asked by the union representatives to meet for the purposes of collective bargaining (or further collective bargaining, as the General Counsel contends). Moussallem, like Loretta, did not refuse. Moussallem, like Loretta, agreed that another agent of the Respondent (herein Jefferis) would meet with the Union. On such evidence in Richmond Toyota, the Board found a "commitment to negotiate," and the Board found a violation of Section 8(a)(5) in the subsequent refusal of Gordon to meet with the union. I would do the same here for Jefferis' subsequent refusal to meet with the Union in this case. Just as much as Loretta made a binding commitment to bargain with the union in Richmond Toyota by agreeing that another agent (Gordon) would meet later (about a week later) for purposes of collective bargaining, Moussallem made a binding commitment to bargain with the Union in this case by agreeing that Jefferis would meet later (about an hour later) with the Union. This case is actually stronger than Richmond Toyota because Jefferis, unlike Gordon Pao in Richmond Toyota, actually met with the Union, knowing all the while that the Union was then seeking recognition and bargaining as the agent of the unit employees. In so doing, Jefferis, as Moussallem's superior, reaffirmed Moussallem's commitment to bargain with the Union. Therefore, without more, I would find and conclude that the Respondent violated Section 8(a)(5) by refusing, on and after February 21, to meet and bargain with the Union.2

There is, however, more. Actual bargaining constitutes not only an acknowledgment of majority status; it constitutes an agreement to engage in further bargaining until either a collective-bargaining agreement is reached or a reasonable amount of time has passed without an agreement being reached. For example, in Vincent M. Ippolito, Inc., 313 NLRB 715 (1994), enfd. 54 F.3d 769 (3d Cir. 1995), the Board found that bargaining had occurred because, after interrogating the unit employees to find that the union did represent a majority: (1) one agent of the employer met with the union and expressly acknowledged that the union represented the employees (without examining union authorization cards that the employees had signed); and (2) another agent met with the union and examined the union's contract proposals and asked various questions about them and commented that the union's wage proposals were similar to what the employer was then paying. The Board found a violation of Section 8(a)(5) in the employer's subsequent refusal to bargain because the facts "establish that the Respondent met, recognized, and thereafter bargained with the Union and later withdrew recognition."

Even more in point is Lyon & Ryan Ford, 246 NLRB 1 (1979), enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981). The employer in that case also did not expressly acknowledge the majority status of the union that sought recognition. The employer did, however, meet with the union on August 24, 1978, at which time: (1) the union demanded recognition and bargaining; (2) the union presented, and the employer examined, authorization cards that had been signed by a majority of the unit employees; (3) the union thereon presented the employer with written contract proposals; (4) the union's representatives explained some of the proposals; (5) the employer's agent asked what the cost of the proposed welfare and pension program was, the union gave the hourly figure, and the employer "turned and punched out some numbers on his adding machine"; (6) the employer asked if an employee would be insured under the union's proposals if injured on a company picnic, and the union answered that, if the accident was not covered under workers' compensation, then the proposed insurance program would apply; (7) the parties then discussed wages and agreed that they were "not far apart"; and (8) the parties agreed to meet on August 28. The parties did meet again on August 28; similar exchanges occurred, but, as was the case on August 24, no agreements were reached, except that the parties did agree to meet on September 1. As the meeting closed, the union representatives asked for permission to go into the employer's shop and talk to some of the employees; the employer agreed, and the representatives did so. Then, when the parties did meet on September 1, the employer demanded a Board election before talking more to the union. The Board approved the finding of the administrative law judge that, under those circumstances, the employer had recognized and bargained with the union "from August 24 until September 1, 1978," and that by refusing to bargain after September 1, the employer violated Section 8(a)(5).

As was the case in *Lyon & Ryan Ford*, the union, possessing the majority support of the unit employees, demanded recognition as the collective-bargaining representative of those employees. As did the employer in *Lyon & Ryan Ford*, the re-

²⁰ The Respondent's brief does not claim that *Jefferson Smurfit* overrules (implicitly or otherwise) *Richmond Toyota*. In fact, the Respondent's brief which, again, otherwise reflects extensive research does not even mention *Richmond Toyota*, even though that case is squarely in point on three major issues in this case; to wit: agency, the necessity of an express acknowledgment of majority status and the commitment to bargain. The omission is telling.

spondent met with the union twice after the union's initial bargaining request before withdrawing recognition; the first meeting here was with Moussallem, and the second was with Jefferis (albeit both meetings were on a single date, February 19, as opposed to the separate dates in Lyon & Ryan Ford). As also was the case in Lyon & Ryan Ford, the Respondent did not expressly acknowledge in either meeting that the Union represented a majority of the unit employees, but the Respondent did bargain with the Union just as much as did the employer in Lyon & Ryan Ford.

The parties in Lyon & Ryan Ford discussed wages, insurance, welfare and pension; the parties here discussed HAZMAT training, other training (at the Union's Plainfield facility), boot allowances, coveralls to be provided, maintenance time, comparative insurance costs, scope of the unit (national versus local), employee morale, tardiness and attendance problems, an attendance-award program, and a progressive disciplinary sys-No agreements were reached (except possibly on HAZMAT training for all employees and that some of the Respondent's employees should be classified for wage purposes as apprentices), but that was the case in Lyon & Ryan Ford also. The Union did not present written contract proposals to the Respondent on February 19, as did the union in Lyon & Ryan Ford, but Jefferis did ask for a copy of the Union's health and welfare program which, of course, was a request for a proposal. (And when the Union subsequently supplied the program, the Respondent did not ask why the Union had sent it.) Additionally, Jefferis asked what the Union could do for the Respondent and sat and listened to Simravh's assurances that the Union would give the Respondent access to its employeereferral system and would provide employee training at the Union's facility. Jefferis (and Bucher) further asked the Union to at least consider hiring a professional engineer for its staff, and the Union agreed to do so. These exchanges can only be described as collective bargaining. (Undoubtedly, lesser progress has been made during the initial bargaining sessions of other relationships that have ultimately proved to be fruitful.)

Finally on this point, the Union did not ask for permission to talk to the employees on the Respondent's premises, as did the Union in Lyon & Ryan Ford, but Jefferis did sit and listen while Simrayh and Edwards told him what the employees' "grievances" were. (Jefferis may not have been familiar with the word "grievance" as it is used in labor relations law, but certainly he knew that the word signified employee complaints about their terms and conditions of employment.) After hearing the first grievance, Jefferis did not tell Simrayh anything like: "Stop; you don't have any authority to present the employees' grievances, and I don't have to sit here and listen to them." Instead, Jefferis gave responses on each grievance (peanuts). Uniformly in American labor relations, the only nonstaff to which an employer will listen about its employees' grievances is the collective-bargaining agent that represents those employees. Moreover, Jefferis admitted that, just before he began the discussion of the employees' grievances, he had examined the union authorization cards and Simrayh had said, "[T]hey [the Union] would like to represent them." Standing alone, Jefferis' entertainment of the employees' grievances, coming as it did after the demand for recognition and the proof of majority status, is compelling evidence that he was recognizing and bargaining with the Union as the collective-bargaining representative of the unit employees.

That is, if Moussallem did not make the commitment to bargain with the Union by agreeing that Jefferis would meet for that purpose, then Jefferis made the commitment by actually bargaining with the Union. The Respondent is therefore bound by the consequences of Jefferis' actions and shall be required to resume bargaining until a contract with the Union is reached or until a reasonable amount of good-faith bargaining on its part has failed to produce a contract.²¹

The cases that the Respondent cites on brief are easily distinguishable. In Trevose Family Shoe Store, 235 NLRB 1229, 1232 (1978), the employer examined the proffered card majority, but he did nothing, such as enter discussions of the employees' terms and conditions of employment, that would have implied recognition. In Ednor Home Care, 276 NLRB 392 (1985), some terms and conditions of employment were "touched on" after the card majority was examined, but the administrative law judge credited the employer's agent's testimony that he spoke to the union's agent only "in order to obtain as much information as possible." (The Respondent offered no such testimony in this case.) In Nantucket Fish Co., 309 NLRB 794, 795 (1992), the employer also did not engage in any discussions of the employees' terms and conditions of employment; the employer did agree to meet with the union after it examined a petition for recognition that was signed by a majority of its employees, but the circumstances did not indicate that the employer was then agreeing to meet for the purposes of collective bargaining.²² Similarly, in Jefferson Smurfit, supra, the employer examined the card majority, but its agent did not expressly agree to recognize the demanding union as the collective-bargaining representative of its employees, and it did not impliedly agree to do so by engaging in bargaining with that union. In this case, the Respondent's agreement to meet for purposes of collective bargaining was not expressed, but it was clearly implied by the conduct of Jefferis and Moussallem; to wit: after receiving the evidence of the Union's majority status and after receiving the Union's request for bargaining, Moussallem agreed that Jefferis would meet with the Union; then Jefferis actually did meet with the Union, also examined its evidence of majority status, and bargained with it.

I feel constrained to further note that the testimony of Jefferis (as well as that of his supporting, but incredible, subordinates) is significant for two things that it is not. First, Jefferis' testimony is not testimony that he told Simrayh and Edwards on February 19 that "neither my staff nor I have power to recognize Local 150 or to bargain or negotiate for Terracon." In his February 21 letter to Simrayh, Jefferis stated that he had made that unequivocal statement on February 19. In court, however, Jefferis did not testify that he told Simrayh and Edwards that he did not have the authority to recognize or bargain

²¹ Lyon & Ryan Ford and Vincent M. Ippolito, Inc., supra (which are also not mentioned in the Respondent's brief).

²² The Board held that the agreement to meet was ambiguous because the employer could have been agreeing to meet only to discuss whether the petition constituted evidence of majority status. Compare, *Richmond Toyota*, supra.

with the Union. (Also, neither Moussallem or Bucher testified that Jefferis made such an unequivocal denial of authority to negotiate with a union.) Second, Jefferis' testimony that he told the Union that some of the terms and conditions of employment that they had discussed "seemed to be peanuts, but they are corporate policies" was not testimony that he told the Union that he had no chance of getting any changes in policies that had theretofore been established by "Corporate." Of course, if Jefferis had followed through on his commitment to bargain with the Union, he might well have been successful in convincing "Corporate" to grant at least some of the concessions that the Union might have demanded in further bargaining. If Jefferis did fail in such efforts, the Union might still have accepted a collective-bargaining agreement that contained only existing terms and conditions of employment (just to get a "foothold," if nothing else). And if the Union had not been willing to accept existing terms and conditions of employment and the parties had gone to impasse, the Respondent would nevertheless have fulfilled the bargaining obligation that Jefferis and Moussallem undertook on February 19.

In summary, I find that, on February 19: (1) the Union demanded (orally and in writing) recognition as the collective-bargaining representative of the Respondent's drillers and helpers, a unit that is appropriate for collective bargaining; (2) the Union demonstrated its majority status to the Respondent at the same time; and (3) the Respondent, by its agents Jefferis and Moussallem, made "the original commitment of the employer to bargain on [that] demonstrable showing of majority" by agreeing to bargain, and by actually bargaining, with the Union as the collective-bargaining representative of the unit employees. I therefore conclude that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on February 21 because a reasonable amount of time for bargaining had not, by that date, elapsed.²⁴

It is undisputed that before February 19 the Respondent's drillers and helpers reported for work at various times between 5 and 6:30 a.m. (and usually at 6 a.m.). However, at some point later in February, as is further undisputed, the Respondent changed the earlier starting times for drillers and helpers to a rigid starting time of 7:30 a.m.²⁵ It is further undisputed that the Respondent did not notify the Union of this change before putting it into effect.

The General Counsel asked Renner: "So, the change in start time affected your pay?" The General Counsel asked Rodriguez, "So, this change to the start time affected your pay?" The General Counsel asked Caballero, "So, the change in the start time reduced your pay?" All three witnesses dutifully answered "Yes" to these blatantly leading questions. On brief, the Respondent contends that the answers to these leading questions

are inadequate to prove that any of the employees' wages were reduced by the change in starting time. If there had been any kind of effective denial, I would tend to agree with the Respondent. Jefferis, however, was asked, and he testified:

- Q. All right, do you know whether or not the memo that was sent out in March of 2001, setting a starting time of 7:30, had any effect on the hours worked by drillers?
- A. I think for total hours, they didn't change them a whole lot.

Jefferis' testimony that total work hours did not change "a whole lot," of course, is hardly testimony that there was no change at all. Jefferis' testimony is therefore not sufficient, alone, to discredit the testimonies of the employees (even though their testimonies were in response to leading questions). The only documentary evidence that the Respondent offered in support of its contention that there was no change in the total hours that the drillers and helpers worked after the February change in starting time consisted of a summary and some business records. The summary was inadmissible under Federal Rules of Evidence 1006 because there was no sworn testimony that it was the product of a review of underlying records. The business records were about an inch thick, and the Respondent offered no explanation of how they proved its point. I therefore rejected the records, as well.

I credit the employees' testimonies on the point and find that there was at least some negative effect on the employees' earnings that was caused by the Respondent's unilateral change. But even without the employees' testimonies I would find that the change in the daily starting time necessarily had a significant adverse impact on the Respondent's drillers and helpers. Being required to start at a later time in the day meant that employees were going to earn fewer wages on any given day, or they were going to have to work later in the day to earn the same amount. In either event, the impact on the unit employees would be significant. Therefore, implementation of any change in starting time should have come only after notification to, and bargaining with, the Union which, as I have found infra, had been the collective-bargaining representative of the unit employees since February 19. I therefore find and conclude that the Respondent, in violation of Section 8(a)(5), changed the work hours of the unit employees without prior notice to or bargaining with the Union. The precise monetary effect of the Respondent's unlawful unilateral action on individual employees will be determined at the compliance stage of this matter.²⁶

²³ Jerr-Dan, 237 NLRB 302, 303 (1978).

²⁴ Brown & Connolly, 237 NLRB 271, 275 (1978).

²⁵ On March 14, by memorandum of that date to the Respondent's "Drillers, Drill Helpers and Project Engineers," Jefferis and Moussallem stated that "[a]s you may already know, we have recently changed the start time for drillers and helpers to 7:30 a.m." The memorandum then gave the reason for the change that had (already) taken place; so that drillers could meet with project engineers before starting each day's work.

²⁶ I find to be without substance the Respondent's position on brief that *FES*, 331 NLRB 9 (2000), a refusal-to-hire case, requires that all issues that can be decided in an underlying unfair labor practice proceeding are to be decided in that proceeding and not left for the compliance stage. The change that *FES* represents applies only to that of a narrow issue (availability of job openings) in a narrow field of cases. If the Board had intended a broader effect, it assuredly would have so indicated (and it certainly did not do so).

- C. The 8(a)(1) Allegations
- 1. Interrogations and threats
 - a. Threat by Marquez

John Howard was employed by the Respondent until late February. Howard testified that in mid-January, when he and Drill Coordinator Osvaldo (Oz) Marquez were alone at the Respondent's facility, there occurred the following conversation:

He asked me what was going on about Saturdays, and I said, "I don't know what you're talking about."

And, he goes, "Well, what about these union cards?" I said, "Well, I don't know what you're talking about." And, he was like, "Well, Kevin [Jefferis] said he would pull all the rigs out and shut the office down."

And I said, "He can't do that." I said, "You know, I've already talked to my brother who belongs to 150, and he even agreed with me."

(Howard was not asked what it was that his brother had agreed with him about.) The complaint alleges that this comment by Marquez was a threat of "loss of work or subcontracting" because of the employees' union activities in violation of Section 8(a)(1). Marquez, who was not employed by the Respondent at time of trial, was not called to testify, and Howard's testimony is not factually disputed. The Respondent contends that, nevertheless, no violation can be found on the allegation because the General Counsel has failed to show that Marquez was a supervisor within Section 2(11) of the Act.

Juan Reyez was employed as a driller and helper by the Respondent until mid-February 2001. Reyez testified that he applied for employment in October 2000 by submitting an application to a secretary at the Respondent's Naperville facility. The secretary told him that someone would call him. A few days later, Marquez called Reyez at home and told him to come to Marquez' home for an interview. After Marquez conducted the home interview, Marquez sent Reyez for a drug test. A few days later, Marquez called Reyez to tell him that he had passed the drug test. Marquez then also told Reyez that he was hired as an employee of the Respondent and that he should give notice to his then-employer (which Reyez did). Marquez also told Reyez that he should report to work on November 1. Reyez did report on that date and began working for the Respondent as a helper without interviewing with anyone else. Revez also testified that Marquez gave him all instructions for his job and granted him time off when Reyez asked. (Reyez further testified that it was Marquez who told him that he needed to call in at least 1 hour before being absent.) Reyez further identified a January 10 memorandum from Marquez to all "Drillers and Helpers." The topic is stated as: "Terracon Driller and Helper Rules." The memorandum lists nine numbered rules for drillers and helpers including "(1) You must be out of the shop 15 minutes after your arrival and 15 minutes after your return at the end of the day. You will not be paid for any more time unless it is approved. (2) All maintenance must be approved by Oz prior to being done. Also, proper forms must be completed on completion of work. See me for the forms. . . . (9) All days will begin at 6:00 a.m. unless you are told otherwise by Oz or Maroun." The notice concludes: "Any employee who does not follow any of these rules will receive a written warning for the first offense. On your second offense you will be given two days off with no pay or PTO [apparently, "personal time off," as paid leavel time. ON YOUR THIRD OFFENSE YOU WILL BE DISMISSED FROM YOUR JOB AT TERRACON. In order for all of us to work as a team we need the cooperation of everyone. So that things may run smoothly and efficiently. Thank you." Also in evidence is a January 8 memorandum from Moussallem to all "Drillers and Helpers." The topic line is "The Golden Rules." The memorandum is quite lengthy in its description of how the drillers and helpers should be performing their jobs; it makes numerous references to Marquez and the necessity for his approval before employees do certain things. The "Golden Rules" memorandum concludes: "Oz or I are available to discuss any questions or issues you might have."

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." It is well established that, because the statutory indicia of supervisory status are written in the disjunctive, the possession of only one of the indicia is sufficient to confer supervisory status on an individual. *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994).

In this case it is clear that Marquez hired Reyez on or about November 1 without the input from any admitted supervisor (such as Jefferis or Moussallem). From that point, at least, Marquez was a supervisor within Section 2(11).²⁷ Even if Marquez was not a supervisor, he was clearly a conduit for management communications to employees as demonstrated by the above memoranda. Marquez was therefore an agent of the Respondent's within Section 2(13). *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998). In either case, the Respondent is bound by any threats that Marquez made to employees if such threats were based on the employees' union activities.

Marquez asked Howard for information about the employees' attending Saturday union meetings and signing union authorization cards. When Howard professed ignorance, Marquez did not buy it. He went ahead and told Howard that, "Well, Kevin Jefferis said he would pull all the rigs out and shut the office down." This was plainly a threat by a supervisor (or agent) that was based on the employees' suspected union activities, and it accordingly violated Section 8(a)(1), as I find and conclude.

²⁷ On brief, the Respondent points to much evidence that was introduced by the General Counsel that did not effectively indicate that Marquez was a supervisor. The Respondent, however, does not mention Marquez' hiring of Reyez.

b. Threat by Kunz

Caballero, who was employed by the Respondent from early 1998 until his termination on April 6.²⁸ When he was terminated, Caballero was a driller. Caballero testified that, during the morning of February 19, after Simrayh and Edwards had left the Naperville office, he was assigned to go to the Respondent's Rockford facility on a job. When he got there, he was wearing his union logo cap. According to Caballero, he went to the office of the Respondent's Rockford office manager, Kunz, and:

I seen him glance up at my Union hat, and I had asked him if he had heard anything from Naperville. And, he told me no. And, I told him that we presented Maroun with authorization cards and that we all wanted to become a union shop.

And, he told me that before we would go union that Kevin [Jefferis] would send the rigs out of state and that he'd subcontract all the work before we'd ever go union.

The complaint alleges that, by Kunz' remark to Caballero, the Respondent, in violation of Section 8(a)(1), threatened employees that their collective bargaining efforts would be futile and threatened to subcontract work because of the employees' union activities.

Kunz testified that on the morning of February 19, Caballero and Medina were sent from the Naperville operation to the Rockford facility to serve on a job as driller and helper, respectively. According to Kunz, at a point when he and Caballero were alone in his Rockville office:

I began going through the drill instructions with Hector, reviewing the project as we normally do. Once we were done with our review of the job, Hector asked me if I heard about the excitement that happened in Naperville that morning. And I told him at that time no.

At that point Hector had told me that the union rep had come into Naperville and had told Kevin that the drillers were going to be unionizing. . . .

At that point I was surprised, and I asked Hector how he thought it went. Hector said he thought it went well. Then I made a statement to Hector that I'd be surprised if the Company would go for it, but I'd been wrong in the past. So that ended up being our conversation

To the extent that this testimony by Kunz was intended to be a denial of Cabellero's specific testimony that "he told me that before we would go union that Kevin Jefferis would send the rigs out of state and that he'd subcontract all the work before we'd ever go union," I discredit it. Caballero appeared completely credible in giving his testimony, and I do credit it. I therefore find and conclude that Kunz threatened Caballero as alleged in the complaint.

c. Interrogation and threat by Jefferis

Rolando Salazar was employed by the Respondent until July 2001 as a driller. Salazar described a February 23 conversation that he had with Jefferis in Jefferis' office (with Marquez also present). According to Salazar:

Jefferis had asked me if I was totally involved in . . . the Union. . . . I told him exactly how I felt about it. I really didn't have nothing to do with this, I didn't want nothing to do with this because I didn't have no problems with the Company. . . .

He asked me basically: "What's going on? We're all supposed to be a family here. How did we get involved in this?" . . .

My response was, "Well, I didn't want to get into this.' I had just started; I didn't want any part of it.

And, then he does, "Well, it looks like you got a good head on your shoulders; you know what you're going to do.... We're supposed to be family-oriented here; we're all supposed to get along, get the job done, do whatever it takes." Then he also went [on] to say [that] if he wanted to he could just shut the drilling operation down here, and send all the equipment elsewhere....

[B]asically that was the end of the conversation.

Based on this testimony by Salazar, the complaint (as amended at trial) alleges that the Respondent, by Jefferis, interrogated Salazar and threatened him that the Respondent would subcontract the drilling work because of the employees' union activities.

On cross-examination, Salazar added that, when Jefferis questioned him about the Union, Jefferis asked who "the ringleader" was. Also, Salazar added that Jefferis had told him that he would contract out the drilling work: "Because of what was going on with the Union." Salazar acknowledged that in the pretrial affidavit that he signed in March 2001, or just after the alleged conversation, he did not state that Jefferis told him that the Respondent might subcontract "Because of what was going on with the union."

Jefferis testified that he could not recall meeting with Salazar, but that he would not have told Salazar that the Respondent would contract out its drilling business because he had received his lawyer's instructions not to make threats to employees about their union activities, "and I didn't want to get in trouble."

Salazar's additions on cross-examination do give me pause; nevertheless, his testimony on direct examination was not denied by Jefferis. Jefferis testified that he would not have threatened or interrogated employees because his lawyer had told him not to. Such testimony would tend to support a denial of testimony such as Salazar's, but it falls far short of a denial itself. That is, by claiming only that he could not recall meeting with Salazar Jefferis did not deny Salazar's specific testimony. Salazar otherwise appeared to be a credible witness, and I do credit his testimony. I therefore find and conclude that the Respondent, by Jefferis, interrogated employees about their union activities or sympathies, or about the union activities or sympathies of other employees, and Jefferis threatened em-

²⁸ Cabellero's termination is discussed infra in connection with the allegation that the Respondent denied another employee's request for Cabellero's presence during an investigatory interview.

ployees with loss of employment because of their union activities, both in violation of Section 8(a)(1).

2. Denial of a fellow employee's assistance at a disciplinary interview

a. Evidence presented by the General Counsel

As previously noted, Hector Caballero was employed by the Respondent as a driller until April 6. Eliezer (Elliot) Rodriguez was employed by the Respondent as a helper from March 2000 also until April 6. Rodriguez testified that his duties as a helper were: "To assist drillers in the field, helping the with supplies, taking samples, bagging them, labeling them." In late February, the Respondent's Cedar Rapids, Iowa operation was quite busy, and it needed more personnel for a contract to sample and test some soil at an Iowa highway construction project. To fill that need, Thomas Salm, manager of the Cedar Rapids operation, asked to borrow a crew from the Naperville operation. Jefferis sent Caballero as the driller and Rodriguez as the helper. The assignment lasted 3 weeks (with Caballero and Rodriguez spending the nights in Iowa motels).

On the morning of April 6, Rodriguez was originally scheduled to work as a helper for another driller, but Marquez told Rodriguez that that assignment had been canceled and that he should stay and work at the Naperville facility. About noon, Jefferis told Rodriguez to follow him to the conference room. When Jefferis and Rodriguez got there, according to Rodriguez, waiting were Moussallem, Salm, and project engineer Matt Riberti (or "Ribordy" as the name is sometimes spelled in the transcript). According to Rodriguez:

Well, Tom Salm, the Cedar Rapids manager, he popped out a blue print map from the road job that me and Hector did in Iowa. And, he said that he had a few questions and concerns about the job we did in Iowa [and] that he wasn't understanding something.

And, well, I told him, that if this had to do with the job in Iowa, that I would like Hector Caballero present, since I was his drill helper [and] he was there with me. . . .

[Jefferis] said that Hector wasn't going to make it in because they attempted to get ahold of him, but he wasn't answering his phone. . . .

I still told them that if it had anything to do with Iowa, I wanted Hector present since he was there with me. And, again, they said no, he wasn't going to make it.

The meeting proceeded with Salm stating to Rodriguez that officials from Iowa were complaining that work for which Iowa had paid the Respondent had not been performed, that it appeared that Caballero and Rodriguez had inflated the hours that they had claimed for working in Iowa during the period in question, and that several spurious charges had been made on two credit cards that had been assigned to him and Caballero (one gas credit card and one general purpose, Visa, credit card). Rodriguez protested that their hours were accurate, that the worksheets were turned in accurately as far as he knew, that only Caballero had the credit cards, and that he knew of no spurious charges. Jefferis then stated that Rodriguez was facing discharge for stealing time and facing criminal charges and jail time for stealing by misuse of the credit cards. Jefferis and

Moussallem told Rodriguez that no charges would be brought against him, and that he would not have to pay back "the money" (what time Rodriguez had stolen, what the Respondent was going to have to remit to Iowa and what had been wrongfully charged on the credit cards), if he would create and sign a statement that he was resigning his employment. Rodriguez further testified that he refused to sign any statement. Jefferis, Riberti, and Salm left the room. Moussallem stayed in the room with Rodriguez. Rodriguez testified that Moussallem said nothing else, but he felt that Moussallem was staying in an attempt to get him to create and sign a statement of resignation. Rodriguez, knowing that he was discharged, left the facility. During examination by the Charging Party, Rodriguez testified that Simravh had told the unit employees, before February 19. of various rights that they had under the law; one of those rights was that they could have another employee present with them when called to meetings with supervisors.

As will be seen, the Respondent contends that Rodriguez signed a resignation during the April 6 interview, and Moussallem identified such a document during the Respondent's case. On cross-examination, before Moussallem testified, Rodriguez was shown the document, but he denied that he signed it and he denied that he had seen it before the regional office investigation of the charges.

b. Evidence presented by the Respondent

Salm described the circumstances that led him to believe that Caballero and Rodriguez had, together, overcharged on the hours of work that they reported and had engaged in unauthorized usages of the Respondent's Visa card while on the Iowa assignment. On review of the complaint from Iowa's department of transportation, Salm found that he had no reports or samples for some of the work that Caballero and Rodriguez should have done; nor did the Respondent have some fuel records for the rig; and charges that could not have been related to the work showed up on the Visa card that was assigned to Caballero.

Salm testified that he, Jefferis, and Moussallem investigated the discrepancies by interviewing both Caballero and Rodriguez. Because the account with Iowa was the responsibility of Salm, he conducted the interviews, although Jefferis, Moussallem and Riberti were present for parts of each of them. Caballero was interviewed first on April 6. Salm testified that, when Caballero was confronted with the discrepancies:

there was a pause again, and he [Caballero] pulled a credit card out of his pocket, laid it on the desk, laid his keys on the desk and started talking about the Wal-Mart purchase. He said that he had purchased clothing because he didn't have any clean clothes. And he seemed to be [in] remorse.

At that point, Salm left the meeting; Jefferis, Moussallem, and Riberti stayed with Caballero in the conference room.

Salm testified that when the supervisors next interviewed Rodriguez, Rodriguez had few answers for the discrepancies, but he admitted that Caballero had bought some clothes for himself and some for him (Rodriguez) at a Wal-Mart with the Visa card. When Rodriguez admitted that Caballero had bought him some clothes with the Visa card, Jefferis asked

Rodriguez what he would do with an employee who charged personal items on a company credit card; Rodriguez replied, "I would fire him." Salm testified that he then left the conference room, leaving Rodriguez with Riberti, Jefferis, and Moussallem. Salm testified that he, not Jefferis or Moussallem, did the questioning during Rodriguez' interview. Salm denied that, at any time during his presence at the interview, Rodriguez asked that Caballero be present.

Jefferis testified that after Salm's April 6 interview with Caballero, he thought Rodriguez "was involved." Jefferis further testified that he did "sit through" Salm's interview of Rodriguez and that the first thing that he remembered of that interview was Salm's laying out drawings on which he questioned Rodriguez. The Respondent did not ask Jefferis if, when the interview started, Rodriguez asked for the presence of Caballero. According to Jefferis, Rodriguez could explain what he and Caballero had done the first week, but not thereafter. After long, silent pauses,

[T]hen Maroun said to him, "What do you think? If you were in our shoes, what do you think we should do?" . . .

First he [Rodriguez] responded that he would, if it was him personally, he would fire the person, something to that effect.

And then I asked him, "What do you want to do?"
And there was a big pause, and then he said, "I guess I'll resign. And then I . . . walked out of the room."

Moussallem also testified that during the April 6 meeting with Caballero (which, again, preceded the interview with Rodriguez), Caballero acknowledged that he had bought personal clothing for Rodriguez with the Visa card. After that, Caballero agreed to resign. Riberti, Salm, and Jefferis then left the conference room. Moussallem stayed behind with Caballero and witnessed a resignation that Caballero wrote out and signed.

Moussallem testified that Rodriguez' interview by Salm had already started when he entered the conference room. Moussallem testified:

When I entered the room, Mr. Salm was going over the plans with Mr. Rodriguez and pretty much asking Mr. Rodriguez what happened, similar to what he asked Mr. Caballero. And Mr. Rodriguez . . . said he [did] not remember.

Moussallem testified consistently with Salm about the content of the interview with Rodriguez. Moussallem described the end as:

At that point when all of these situations were presented by Mr. Salm, I asked Mr. Rodriguez, "Elliot if, if you were in our shoes what would you do?"

And Mr. Rodriguez said, "I would not put up with it."
At that point I think Mr. Jefferis asked him, "Do you want to resign or do you want us to continue the investiga-

And there was a long pause and then Mr. Rodriguez said, "I'll resign." \dots

Mr. Jefferis asked $\lim \ldots$ to put it in writing, and he was given a notepad and at that time everyone left the li-

brary [and conference room] except for myself and Mr. Rodriguez.

He started writing down his resignation, and I noticed that at the end he wrote down "ER." These are his initials.

And I told him, "You need to write your name because we don't know who 'ER' is. And that's when he wrote his full name after that.

The document that Moussallem identified as Rodriguez' resignation states, in handprint:

On this day—4-6-01—2:55 p.m. I resine from Terracon Consultance. *E.R.* Elie Rodriguez.

(Spellings and underlining are in original.) The word "Consultance" was apparently intended to be "Consultants." (The Respondent's business, again, is that of an engineering consultant.) In the space for "Employer" on the union authorization card that Rodriguez identified as his, and which the General Counsel placed in evidence, Rodriguez wrote "Terracon Consultance." On the eight other union authorization cards that the General Counsel introduced, not one employee (or Carpenter) used the term "consultance" (or consultants.)

c. Conclusions

Under NLRB v. J. Weingarten, 420 U.S. 251 (1975), an employee has the right to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. In Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), enfd. 258 F.3d 1095 (2001), the Board extended Weingarten rights to employees of nonunionized employers so that they now have the right to have a requested coworker representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The General Counsel contends that Rodriguez made such a request for Caballero on April 6 and that under either Weingarten (because the Respondent should have been recognizing the Union as the collectivebargaining representative of the unit employees at the time) or under Epilepsy Foundation (because the Respondent actually was not recognizing the Union at the time) Rodriguez was entitled to the presence and assistance of "fellow employee" Cabal-

Caballero was not a "fellow employee" when Rodriguez' April 6 interview began. Caballero was the General Counsel's witness for other purposes, but he was not called in rebuttal to deny that he resigned during his April 6 interview, and the Respondent's testimony that Caballero was interviewed before Rodriguez was credible. It is further true, as the Respondent observes, that Caballero and Rodriguez were apparent "coconspirators" in the thefts involved. The first thing that an interviewer wants to do in the case of coconspirators is to separate them. (Even the Board conceded in the enforcement proceedings of Epilepsy Foundation that Weingarten theories do not apply to coconspirators.) I reach the conclusion on the instant allegation, however, on neither the theory that Caballero was not a fellow employee nor the theory that neither Weingarten nor Epilepsy Foundation applies because Caballero and Rodriguez were coconspirators.

It is my strongest belief that Rodriguez lied when he testified that he did not compose, and sign, the resignation that Moussallem identified. Although I have discredited certain of the Respondent's testimony above, I do not believe that the Respondent fabricated the document that it introduced as Rodriguez' resignation. Moreover, the writing on the resignation and on Rodriguez' union authorization card appear to be the product of the same hand. Finally, the infusion of the nonword "Consultance" in both the union authorization card and the resignation is too much to attribute to coincidence. Rodriguez' apparent lie about the resignation causes me to find that he was, at least, an untrustworthy witness, and I shall not base any finding or order on his testimony. For this reason, and because Salm had a credible demeanor, and because there was no reason (other than Rodriguez' testimony) to discredit Salm, I credit Salm's denial that Rodriguez requested the presence of Caballero during Rodriguez' April 6 interview. I shall therefore recommend dismissal of the allegation that the Respondent unlawfully denied to Rodriguez the presence of a fellow employee at the disciplinary interview of April 6.

(The General Counsel argues that I cannot credit Salm because the Respondent led Salm to his denial, because the Respondent did not ask Jefferis or Moussallem for denials, and because it did not call Riberti to testify. The General Counsel did not allege or prove that Riberti was a member of management, and an adverse inference is not to be drawn from the Respondent's failure to call him as a witness. International Automated Machines, 285 NLRB 1122 (1987). Moreover, the Respondent properly led Salm to a specific denial only after a thorough examination on what was, in fact, said during Rodriguez' interview. I further credit Moussallem's testimony that the interview of Rodriguez had begun before he entered the conference room, and it is therefore problematical that he would have heard any request by Rodriguez for the presence of Caballero. It is true that Jefferis was present for the beginning of Rodriguez' interview, and it is also true the Respondent failed to ask Jefferis to deny that he had heard such a request. That lawyer's failure, however, does nothing to enhance the credibility of Rodriguez. That is, the General Counsel failed to carry her burden of proof that Rodriguez made a request for Cabellero's presence at the April 6 interview.)

CONCLUSIONS OF LAW

- 1. The Respondent is, and has been at all times material, an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

- 3. A unit that is appropriate for bargaining under Section 9(b) of the Act is:
 - All drillers and drilling helpers employed by the Respondent at its Naperville, Illinois, facility, excluding all office clerical employees and guards, and excluding all professional employees and supervisors as defined by the Act.
- 4. Since February 19, 2001, the Union has been, and is, the exclusive collective-bargaining representative of employees employed by the Respondent in the unit described above for purposes of collective bargaining with respect to wages, hours, and other conditions of employment.
- 5. By interrogating its employees about their membership in, or activities on behalf of the Union, the Respondent has violated Section 8(a)(1) of the Act.
- 6. By warning its employees that their activities on behalf of the Union would be futile, the Respondent has violated Section 8(a)(1) of the Act.
- 7. By threatening its employees that the Respondent would close its Naperville, Illinois facility, and that it would contract out the work of that facility, because its employees have engaged in activities on behalf of the Union, the Respondent has violated Section 8(a)(1) of the Act.
- 8. By withdrawing recognition from the Union as the collective-bargaining representative of the employees in the unit described above, the Respondent has violated Section 8(a)(5) of the Act.
- 9. By unilaterally changing the work hours of the unit employees, the Respondent has violated Section 8(a)(5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions to effectuate the policies of the Act.

The Respondent shall be required to bargain with the Union in good faith as the exclusive representative of the unit of employees described above concerning their terms and conditions of employment and, if an agreement is reached, to embody such understanding in a signed agreement. As remedy for the unilateral changes in work hours of the unit employees that I have found that the Respondent implemented, the Respondent shall be ordered to rescind them, on request by the Union, and to make any employee who was adversely affected by those changes whole for any loss of earnings or other benefits, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]